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SUPREME COURT, U.S.

Vol. I

(Pages 1 to 579)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952—

No. 262

CALMAR STEAMSHIP CORPORATION,
PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 303

CALMAR STEAMSHIP CORPORATION,
PETITIONER,

vs.

SYDNEY KEITH SCOTT, ONE OF THE LLOYDS UNDERWRITERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 262—PETITION FOR CERTIORARI FILED AUGUST 7, 1952
NO. 303—PETITION FOR CERTIORARI FILED AUGUST 28, 1952
CERTIORARI GRANTED OCTOBER 20, 1952

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

The libel and complaint of CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,

Libelant,

against

UNITED STATES OF AMERICA, and EMORY S. LAND, H. L. VICKERY, THOMAS M. WOODWARD, EDWARD MACAULEY and JOHN M. CARMODY, constituting the UNITED STATES MARITIME COMMISSION, and

EMORY S. LAND, ADMINISTRATOR, WAR SHIPPING ADMINISTRATION,

Respondents.

Ad. 129-295.

Docket Entries.

1944

Feb. 11	Libel filed and citation issued.
Feb. 14	Affidavit of service of libel upon U. S. A. filed.
Feb. 24	Citation with Marshal's return of service on respondents other than United States, filed.
Mar. 7	Letter from Department of Justice, Form C, filed.

1945

Jan. 12	Notice of change of firm name (Kirlin, Campbell, Hickox & Keating) filed.
July 2	Notice of Appearance of U. S. A. filed.

1947

June 11	Affidavit of Continuance filed.
Aug. 9	Order re: Decree Pro Confesso, filed.
Aug. 28	Answer of United States filed.

4 *Docket Entries.*

1948		
Jan.	9	Consent and Order of Discontinuance as against all respondents other than the United States, filed.
1950		
May	3	Pre-trial hearing before Leibell, J. Marked "T. C."
1951		
Jan.	18	Trial begun before Ryan, J. (tried with A. 133-332).
Jan.	19	Trial continued and concluded, decision reserved.
5 Feb.	23	One volume of stenographer's minutes filed (also in A. 133-332).
May	25	Opinion No. 19,367, Ryan J., and Findings of Fact and Conclusions of Law filed. Libelant to recover as indicated (see Opinion) (also in A. 133-332)
		Stenographer's minutes filed.
June	15	Notice of Motion for consolidation with A. 133-332, etc. filed. Respectfully referred to Judge Ryan. (filed in A. 133-332)
June	27	Final Decree filed. Calmar Steamship Corporation to recover from U. S. A. the sum of $238.50
6		with interest in the sum of $70.32. Ryan, J.
Aug.	27	Stipulation and Order filed for one record in the appeal of this case and Ad. 133-332.
Sept.	13	Libelant's Notice of Appeal and Allowance filed (I. R. Kaufman, J.)
Sept.	25	Respondent's Notice of Appeal filed.
Sept.	25	Allowance of Respondent's Notice of Appeal filed (Clancy, J.).
Sept.	25	Respondent's Assignments of Error filed.
Oct.	2	Stipulation and Order re Exhibits to be printed on appeal.
Oct.	17	U. S. Court of Appeals stipulation and order extending time to file record to December 12, 1951.
Oct.	22	Filed libelant's Assignment of Errors.

Docket Entries.

7

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

CALMAR STEAMSHIP CORPORATION,
Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's underwriters, *et al.*,

and

EDINBURGH ASSURANCE CO., LTD., *et al*,

and

EXCESS INSURANCE COMPANY, LIMITED,
Respondents.

Ad. 133-332.

8

1944

Nov. 15 Libel filed.
Nov. 22 Notice of Appearance of respondents filed.
Dec. 4 Letter from Department of Justice—Form "A", filed.

1945

Jan. 12 Notice of change of firm name (Kirlin, Campbell, Hickox & Keating) filed. 9
Dec. 18 Depositions of A. Michelson and J. E. Bullock filed.

1947

July 18 Answer of Sydney Keith Scott, *et al.* filed.

1949

Oct. 28 Order for issuance of a Commission to London, England, filed.
Dec. 2 Cross-interrogatories to Arthur James Whittall, *et al.* filed.
Dec. 5 Stipulation and Order re: objections to interrogatories, etc. filed.
Dec. 13 Direct Interrogatories addressed to Arthur James Whittall, *et al.* filed.
Commission to London, England issued.

10

1950	
Jan. 11	Order amending Commission, filed.
Feb. 28	Commission returned from London, England, filed.
May 2	On Call of Pre-Trial before Leibell, J. Adjourned to May 3, 1950.
May 3	Pre-Trial hearing before Leibell, J.—marked "T. C."
1951	
Jan. 18	Trial before Ryan, J. (tried with A. 129-295)
Jan. 19	Trial continued and concluded. Decision reserved. Ryan, J.
11 Feb. 23	One volume of stenographer's minutes (filed in A. 129-295), filed.
May 25	Opinion No. 19,367—Ryan, J. and Findings of Fact and Conclusions of Law filed. Libelant to recover as indicated (see Opinion) (filed in A. 129-295). Stenographer's minutes filed (filed in A. 129-295).
June 15	Notice of Motion for Consolidation with A. 129-295, etc. filed—Respectfully referred to Judge Ryan for a hearing (filed in A. 129-295).
June 27	Interlocutory decree with reference to John Spallone, as Commissioner. Ryan J.
July 9	Filed Stipulation re findings, etc.
12 July 11	Filed Notice of Appeal from interlocutory decree and allowance (Holtzoff, J.).
July 16	Bill of Costs taxed at the sum of $597.00.
July 20	Filed Order withdrawing appeal from interlocutory decree.
July 20	Final decree filed; libelant to recover the sum of $1,390,471.05 (Holtzoff, J.).
Aug. 27	Stipulation and Order filed for one record in the appeal of this case and Ad. 129-295.
Sept. 20	Stipulation re payment in lieu of supersedeas bond.
Oct. 2	Stipulation and Order re Exhibits to be printed on appeal.
Oct. 15	Filed respondent's Notice of Appeal and Allowance (Ryan, J.); and undertaking.
Oct. 16	Filed respondents' Assignment of Error.
Nov. 23	U. S. Court of Appeals stipulation and order extending time to file record to December 12, 1951.

Libel, Dated February 11, 1944.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

The libel and complaint of CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,

against

UNITED STATES OF AMERICA, and EMORY S. LAND, H. L. VICKERY, THOMAS M. WOODWARD, EDWARD MACAULEY and JOHN M. CARMODY, constituting the UNITED STATES MARITIME COMMISSION, and

EMORY S. LAND, ADMINISTRATOR, WAR SHIPPING ADMINISTRATION.

Ad. 129-295

In a cause of contract, civil and maritime, alleges on information and belief, as follows:

For a First Cause of Action:

FIRST: At all times hereinafter mentioned libelant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business at No. 25 Broadway, Borough of Manhattan, City and State of New York, within this district, and within the jurisdiction of this Honorable Court.

(By consent order, dated January 9, 1948, the above libel was discontinued as against all respondents other than the United States of America.)

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Cross by Mr. Collins 439
Re-direct by Mr. Murphy 440
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Leslie Kingdon Sweet (Marine Underwriter),

Robert Hutchings Whittall (Marine Underwriter),

Noel Ryder Jenkins (Marine Underwriter),

George Christopher Bedwell (Adjuster of Claims),

Harold Halton Mummery (Marine Underwriter),

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LIBELANT'S EXHIBITS.

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1. Particulars of SS. *Portmar*	129	580
2. Certificate of speed of SS. *Portmar* from American Bureau of Shipping, dated April 25, 1944	130	581
3. Time charter of SS. *Portmar* between Calmar Steamship Corporation, owner, and United States Maritime Commission, charterer, as of November 21, 1941	132	18
4. Stipulation of November 1, 1950 between proctors for libelant and proctors for respondents in A. 133-332, containing photostat copies of various documents	134	582
5. Stipulation of November 6, 1950 between proctors for libelant and proctors for respondents in A. 133-332, containing photostat copies of various documents	136	592

	Admitted at Page	Printed at Page
6. War Risk Insurance Policy of Lloyd's underwriters on SS. *Portmar* in the sum of $714,000.00	136	70
7. War Risk Insurance Policy of Institute of London Underwriters' Companies on SS. *Portmar* in the sum of $116,000	136	
8. War Risk Insurance Policy of Excess Insurance Co., Ltd. on SS. *Portmar* in the sum of $30,000	136	
9. Letter: Calmar to B. K. Ogden, Director, Division of Insurance, U. S. M. C., dated November 26, 1941	140	598
10. Letter: B. K. Ogden, Director, Division of Insurance, U. S. M. C., to Calmar, dated February 20, 1942	140	602
11. Shipping Articles of SS. *Portmar*	141	†
12. Cable: Michelson to Calmar, dated April 1, 1942	145	603
13. Telegram: I. M. Holt, War Shipping Administration, to Calmar, dated Feb. 23, 1942	146	603
14. Cable: Michelson to Calmar, dated March 24, 1942	147	604
15. Cable: Michelson to Calmar, dated March 23, 1942	147	604
16. Cable: Calmar to Michelson, dated March 27, 1942	147	605
17. Cable: Malleson, Stewart to Calmar, dated March 30, 1942	147	605

* These Exhibits will be handed up to the Court in a Separate Volume.

† Omitted pursuant to Stipulation printed at page 785.

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18. Letter: J. C. Outler, W. S. A., U. S. M. C. to Mr. H. W. Warley of Calmar, dated April 3, 1942	148	606
19. Cable: Calmar to Malleson, Stewart, dated April 7, 1942	148	607
20. Consisting of twenty cables and one letter	150	607
21. Letter: William Radner, General Counsel, W. S. A., to Calmar, dated October 24, 1942	150	622
22. Telegram: W. C. Peet, Jr., to Calmar, dated November 12, 1942, as to requisition of title to SS. *Portmar*	151	624
23. Certificate of requisition of title to possession of SS. *Portmar* by the United States War Shipping Administrator at Brisbane, Queensland, Australia, dated November 17, 1942, signed by H. A. Rettig for U. S. W. S. A.	151	625
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* These Exhibits will be handed up to the Court in a Separate Volume.

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29.	Chart of harbor of Port Darwin with marks made by Captain Michelson	170	*
30.	Receipt dated February 21, 1942, given to Captain Michelson for secret codes by Australian Naval Authorities	171	*
31.	Memorandum: Frank LaRue, Lt. Col., Inf., to Captain Michelson, dated February 26, 1942	171	628
32.	Axel Michelson's Marine Note of Protest before U. S. Vice Consul, dated March 23, 1942, at Melbourne, Australia	171	†
33.	Marine extended protest of Axel Michelson, Master, Joseph Bullock, Mate, John P. Cumber, Chief Engineer, Charles H. Mathews, Deck Engineer, and Eivind Steen, A.B., before United States Vice Consul at Melbourne, dated March 25, 1942	171	*
34.	Axel Michelson's Marine Note of Protest before Edward James Hamilton, Notary Public, dated March 27, 1942, at Melbourne, Australia	171	†
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* These Exhibits will be handed up to the Court in a Separate Volume.

† Omitted pursuant to Stipulation printed at page 785.

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44.	Letter: Axel Michelson to Malleson, Stewart & Co., dated August 14, 1942	173	635
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† Omitted pursuant to Stipulation printed at page 785.

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B	Authenticated copy of Naval Radio Dispatch to all merchant ships, dated December 7, 1941	180	661

* These Exhibits will be handed up to the Court in a Separate Volume.

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3.	Letter from D. C. Anderson, Underwriter of American Marine Insurance Syndicates to the Policy Form Committee of the Syndicates, dated January 12, 1940, requesting approval of a redrafted Free of British Capture Hull Clause	231	671

* These Exhibits will be handed up to the Court in a Separate Volume.

Master, were returned to the United States. The Master remained in Australia in the interest of the vessel until March 6, 1943.

TENTH: On or about February 22, 1942, salvage services for the raising and restoration of the *Portmar* were commenced by Captain John Protheroe Williams, Managing Director of United Proprietary Limited, incorporated in the State of Victoria, for the purpose of rendering salvage services. Captain Williams was also duly appointed chief salvage officer of the Commonwealth Salvage Board, an
41 agency of the Australian Government created for the purpose of rendering aid in the salvage of vessels in Australian waters. These services, with expert divers and workmen, were diligently prosecuted until on or about the 5th day of April, 1942, when the vessel was floated, and with the aid and assistance of a vessel provided by the local naval authorities was removed to a place of safety.

ELEVENTH: After the *Portmar* was floated she was handed over to the shipping authorities at Darwin, and, pursuant to towage arrangements made between representatives of American Military Authorities and the Com-
42 monwealth Salvage Board, was towed to Brisbane for repairs, where she arrived on July 29, 1942. Surveys and temporary repairs were made as soon as practicable; permanent repairs not being possible, the *Portmar* proceeded to the port of Sydney under her own steam, where she arrived on November 24, 1942.

TWELFTH: The War Shipping Administration requisitioned title to, and took possession of, the *Portmar* effective at 12 o'clock on November 17, 1942, Eastern Australian time. The vessel was then at Brisbane, still in damaged condition, as repair of the damage had not theretofore been possible.

Libel, Dated February 11, 1944.

THIRTEENTH: On February 13, 1943, surveyors representing libelant, respondents and underwriters, after having previously held comprehensive surveys, agreed and reported to all the interested parties that the costs of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Port Darwin in February 1942 would amount to £28,000 Australian currency.

FOURTEENTH: Respondents were and are liable under the charter to pay hire on the vessel at the rate provided in the charterparty, as hereinbefore set forth, up to the time of the requisition of title. Hire was paid in full up to the 1st day of March, 1942. No payment of hire in any amount has been thereafter made, but has been refused and still is refused.

FIFTEENTH: By reason of the premises there is due and owing to libelant from respondents the sum of $345,591, no part of which sum has been paid although duly demanded.

For a Second Cause of Action.

SIXTEENTH: Libelant here realleges each and all of the allegations set forth in Articles numbered FIRST to THIRTEENTH of this libel, inclusive, with the same force and effect as if here set forth at length.

SEVENTEENTH: Pursuant to the provisions of Article 2:17 of said charter, libelant took out insurance covering said vessel against war risks for the voyage provided in said charter, in the sum of $860,000 on said vessel valued at $860,000, and the premiums for said insurance were paid by respondent, United States of America.

EIGHTEENTH: The damages suffered by said vessel as aforesaid were of the class covered by said policies, and

due claim for said losses has been made against underwriters on said policies, but said underwriters have denied all liability, and refused payment thereof, on the ground that the *Portmar* was not covered by said policies at the time of the loss.

NINETEENTH: Notwithstanding the requirements of Article 2.17 of said charter, said vessel was required to sail from Port Darwin toward Koepang, Timor, under the direction of the Commander of U. S. S. *Houston* without
47 any notice thereof being given to libelant, and before any opportunity was afforded libelant then to place any new insurance against war risks on said vessel, or any war risk protection and indemnity insurance, if required, and before any such insurance was placed by libelant, all in breach of the provisions of Article 2.17 of said charter.

TWENTIETH: If it should ultimately be determined that by reason of the matters aforesaid said vessel was not covered by the war risk insurance referred to in Article SEVENTEENTH hereof, or by war risk protection and indemnity insurance, then said vessel and libelant were entirely uninsured at the time of said loss against such war risks under
48 any policies of insurance provided by libelant, and respondents were and are liable as insurers of such war risks assumed by them under the provisions of Article 2.17 of said charter.

TWENTY-FIRST: As a result of the damages suffered by said vessel, the death by enemy action of a member of the crew, the cost of salvage, towage, repatriation of crew, Master's expenses and legal and miscellaneous expenses, libelant has sustained damages in the sum of $250,000.

TWENTY-SECOND: By reason of the premises there is due and owing to libelant from respondents, the sum of $250,000, no part of which sum has been paid although duly demanded.

Libel, Dated February 11, 1944. 49

For a Third Cause of Action.

TWENTY-THIRD: Libelant here realleges each and all of the allegations set forth in Articles numbered First to Thirteenth of this libel, inclusive, with the same force and effect as if here set forth at length.

TWENTY-FOURTH: Respondents became and are obligated to indemnify libelant for all losses and liabilities arising from compliance with the orders and directions of the Naval and Military Authorities of the United States, or of 50
any other officers acting for and on behalf of respondents, in ordering said vessel to sail from Port Darwin in convoy and to return to Port Darwin, under circumstances and conditions whereby she was subjected to violent enemy attack and bombardment, in consequence whereof libelant sustained and incurred the damages, losses and expenses alleged in Article Twenty-first hereof, in the sum of $250,000.

TWENTY-FIFTH: By reason of the premises there is due and owing from respondents to libelants the sum of $250,000, no part of which sum has been paid, although 51
duly demanded.

TWENTY-SIXTH: Libelant has duly performed each and all of the terms and conditions of said Charter on its part to be performed.

TWENTY-SEVENTH: As a result of the matters hereinbefore alleged, respondents and each of them are liable to libelant for, and there is now due and owing from respondents and each of them to libelant, the total sum of $595,591, together with interest on the several items composing said sum, no part of which sum has been paid, although duly demanded.

52 *Exhibit A, Attached to Libel, Dated February 11, 1944.*

TWENTY-EIGHTH: All and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays that citation in due form of law, according to the rules and practice of this Honorable Court may issue against respondents and each of them, citing them and each of them to appear and answer in the premises; that libelant may have decree against respondents and each of them for its damages with interest as aforesaid, together with costs; and that libelant may have such
53 other and further relief as may be just.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
Proctors for Libelant,
Office and Post Office Address:
120 Broadway,
Borough of Manhattan,
New York 5, N. Y.

(Verified by H. W. Warley, President of Calmar Steamship Corporation, February 11, 1944.)

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Exhibit A, Attached to Libel, Dated February 11, 1944.

Contract MCc-1915

Time Charter.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a

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mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

WITNESSETH:

WHEREAS:

I. The Charterer has determined, pursuant to the provisions of an Act of Congress approved June 6, 1941 (Public Law 101—77th Congress), that vessels in addition to those otherwise available are necessary for transportation of foreign commerce of the United States, or of commodities essential to the national defense;

II. The Charterer deems the terms and conditions hereof and the period of this Charter and the restrictions herein contained to be necessary or desirable for the protection of the public interest and the rate of hire herein provided to be fair and reasonable.

NOW, THEREFORE, the Owner and Charterer agree:

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's dead-

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SECOND: At all times hereinafter mentioned, the United States of America was and still is a sovereign, which, by the Suits in Admiralty Act (approved March 9, 1920; 41 Stat. 525), has consented to be sued in this Honorable Court on the cause of action hereinafter set forth.

THIRD: Emory S. Land, H. L. Vickery, Thomas M. Woodward, Edward Macauley and John M. Carmody are, and were at all times hereinafter mentioned, the duly appointed members of the United States Maritime Com-
17 mission, an agency of the United States of America, created under and pursuant to the Merchant Marine Act, 1936, as amended, and Emory S. Land is the duly appointed Chairman of said Commission.

FOURTH: By Executive Order 9054, dated February 7, 1942, the President of the United States established a War Shipping Administration under the direction of an Administrator, and delegated to the Administrator the following functions and duties, among others:

> "The functions, duties, and powers conferred by law upon the United States Maritime Commission
18 with respect to the operation, purchase, charter, insurance, repair, maintenance, and requisition of vessels, and the issuance of warrants with respect thereto, under the Merchant Marine Act of 1936 as amended, 49 Stat. 1985, Public Law 101 Seventy-Seventh Congress, approved June 6, 1941, and Executive Order 8771 issued pursuant thereto, Public Law 173, Seventy-Seventh Congress, approved July 14, 1941, are hereby transferred to the Administrator;"

and Emory S. Land is the duly appointed Administrator, War Shipping Administration.

FIFTH: As of November 21, 1941, libelant, owner of the SS. *Portmar*, a vessel documented under the laws of the

United States, entered into a charter for said vessel with respondent, United States of America, by respondent, United States Maritime Commission, and with respondent, United States Maritime Commission, which charter said Commission executed under and pursuant to the authority vested in it by the Act of Congress approved June 6, 1941 (Public Law 101—77th Congress). A copy of said charter is hereto attached, marked Exhibit A, and hereby made a part of this libel.

SIXTH: Among other provisions, said charter contained 20
the following provisions pertinent to the causes of action herein alleged:

"PART I.

"ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

"ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated 21
per month or pro rata for any portion thereof. * * *

"ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

"ARTICLE 1.04. The Vessel shall be delivered at the port of Portland, Oregon on or about November 21, 1941, and redelivered (unless lost) at a U. S. North Atlantic port, north of Cape Hatteras. * * *"

PART II.

* * * * * *

"ARTICLE 2.03. The Charterer shall: (except as otherwise specifically provided herein) pay hire for

the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the 23 casualty last occurring shall be the time when hire ceases. Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time. The hire provided for in this Charter shall be due and payable on the first day of each calendar month for the preceding month or portion thereof."

24 . . . . . .

"ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel;

. . . . . .

"*Provided*, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and

to prevent loss of time, payment of hire shall not cease because of:

. . . . . .

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused br contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or over-crowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships;"

. . . . . .

"ARTICLE 2.11. . . . The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages. . . .

"The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter.

. . . . . .

"ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be

made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured (ii) all war risk insurance, as required, on the lives of or for injuries to officers and crew and loss of or damage to their personal effects, including sextants of deck officers, or leased equipment aboard for which the Owner is responsible, and on slop chests; and (iii) war risk protection and indemnity insurance, for the benefit of the 29 Owner and the Charterer as their interests may appear, including Owner's liabilities to officers and crew until repatriated.

"The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

* * * * * *

"ARTICLE 2.27. The Master and the Vessel shall 30 have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; *provided, however,* that whenever any such

orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions or other orders of the Charterer as to the employment of the Vessel hereunder, the Master shall, if practicable, apply to the Charterer or its agents or to a representative of the Government of the United States for consent or advice and shall not comply with such orders or directions unless such consent or advice to comply is first obtained; provided further, however, that if it is impracticable in any case to act in accordance with the foregoing 32
proviso, the Master's decision as to compliance with any such orders or directions shall be made with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel, her crew and cargo."

SEVENTH: On November 28, 1941, pursuant to said charter said SS. *Portmar,* being then seaworthy in all respects and fit for the voyage called for by said charter, sailed from San Francisco, with a cargo of military supplies and equipment, bound for Manila, Philippine Islands, and followed that voyage until December 11, 1941, when she was ordered by the Commandant of the 12th United States Naval District to proceed to Suva, Fiji Islands, there to 33
await orders from the British Naval authorities. On arrival at Suva, the Master of the *Portmar* reported to the British Naval Control Officer, and on December 22, 1941 was ordered by said British Naval Control Officer to proceed to Sydney, Australia. The *Portmar* arrived at Sydney on December 30, 1941, and her Master there reported to the Australian Naval Control Officer, who ordered the vessel to proceed to Brisbane and there discharge part of her cargo. The *Portmar* arrived at Brisbane on January 5, 1942, and there discharged a portion of her cargo designated by the Australian Naval Control Officer, who ordered the *Portmar* to proceed to Port Darwin with the remainder of the cargo. The *Portmar* arrived at Port Darwin on January 19th and

her Master there reported to the Australian Naval Control Officer, who ordered the *Portmar* to discharge the remainder of the cargo so soon as a berth at the jetty was available. Pursuant to said order the *Portmar* remained at anchor for several days awaiting berth, and then moved into berth and discharged the remainder of her cargo, except 1500 drums of gasoline which her Master was ordered by the Australian Naval Control Officer to retain on board. The Master was next ordered by the Australian Naval Control Officer at Port Darwin to reload 500 drums which
35 had been discharged, and to proceed to Wyndham, Western Australia, to discharge all the drums on board and return to Port Darwin. Pursuant to said order the *Portmar* sailed from Port Darwin on February 4, 1942 and on February 8, 1942 arrived at Wyndham. The *Portmar* there discharged all cargo on board, and then pursuant to orders as above stated returned to Port Darwin, arriving there on February 12, 1942.

EIGHTH: At 1:00 A. M. on February 13, 1942, the Australian Naval Control Officer ordered the *Portmar* to berth at daylight, and on the 13th and 14th the *Portmar*, pursuant to orders given by military authorities of the
36 United States, and (with the cooperation of) the Australian Naval Control Officer, loaded military equipment, stores and troops, including approximately 300 officers and men of the 148th United States Field Artillery Regiment. At about 9:30 P. M. on February 14th the Master was ordered by the Australian Naval Control Officer to report on board the *U. S. S. Houston*, and there received orders from the Commanding Officer of the *U. S. S. Houston* and from the Australian Naval Control Officer to proceed in convoy under the former's command. At 1:30 A. M. on February 15th, the *Portmar* left Port Darwin in convoy with other vessels under the command of the Commanding Officer of the *U. S. S. Houston*, and proceeded towards Koepang, Timor.

NINTH: On February 15th and 16th the convoy was attacked by enemy bombers, and suffered damage. In consequence thereof, the convoy was ordered to and did return to Port Darwin, arriving there about noon, February 18th, 1942. At about 9:55 A. M. on February 19th an aerial attack was made by enemy bombers on the harbor of Port Darwin, and in such attack the *Portmar* sustained such extensive damage, both on deck and below, that the ship began to take in water through perforations in the hull. Both standard and steering compasses were put out of action by reason of damages sustained in the aerial attack. Fire broke out in No. 4 and 5 holds, but was brought under control. Being unable to keep the water down by pumping, and as the ship was taking a severe list, the Master decided to beach the vessel. While searching for an advantageous place, having no compass to assist in navigation, the *Portmar* ran aground at 2:12 P. M. on February 19th, 1942, on the starboard side from amidships to stern on the south side of a small cove south of Channel Island in about 11 or 12 feet of water. Efforts were made to plug holes in the hull made by bomb fragments and aerial fire, but the water in the vessel increased, until she took a list of about 40°, and the Master, in view of the danger of capsizing, gave orders for the crew to leave the ship. The members of the crew were removed, but the Master with three members stood by the vessel until February 21st, at which time the after decks were completely submerged at high tide. On that day the Master ordered the starboard anchor lowered in order to hold the ship in case of a high rise of the tide.

On February 23rd the Master returned to the vessel and remained on board over-night and on February 24th. Again on March 2nd and 3rd the Master returned to the vessel and found that she had settled further by the stern, until the water completely covered the poop deck. Thereafter the Master, officers and crew were sent overland across Australia to Melbourne, where they arrived at Melbourne on March 22, 1942. Later the officers and crew, except the

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thereof, if required, and hire shall be suspended for any resulting loss of time. Any and all overtime or additional compensation based upon the nature of the work done, whether in port or at sea, payable to the Vessel's personnel, by reason of the Charterer's orders or operations, shall be paid by the Charterer at rates stated in the Vessel's Articles or collective bargaining agreements.

ARTICLE 2.15. All bills of lading issued hereunder shall contain, directly or by reference, the following clauses:

89 (i) *Clause Paramount*

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

90 (ii) *Both-to-Blame Collision Clause*

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carry-

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ing ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

(iii) *General Average Clause*

"General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not 92
provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. 93
Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposit shall at the option of the carrier, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money."

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weight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. The Owner shall not be obliged, however, to provide any accommoda-
59 tions beyond such as may be available on delivery of the Vessel. The Owner will victual pilots free of charge. All monies, except hire, accruing in any month in favor of the Owner under any provision of this Charter (including such victualling) shall be payable on the first day of the next succeeding calendar month.

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

ARTICLE 1.04. The Vessel shall be delivered at the port of Portland, Oregon on or about November 21, 1941, and redelivered (unless lost) at a U. S. North Atlantic port,
60 north of Cape Hatteras. Notice of redelivery pursuant to ARTICLE 2.03 shall be given 15 days in advance.

ARTICLE 1.05. This Charter consists of this PART I and of PART II annexed hereto as Exhibit A. Unless in this PART I otherwise provided, all of the provisions of said PART II shall be part of this Charter as though fully incorporated herein.

ARTICLE 1.06. *Special Provisions.*

(a) The Charterer shall reimburse the Owner for its actual out-of-pocket expenses for any war bonuses, extra wages based on the areas to be transversed during, or the ports of call of, the voyage and extra wages arising out of

the nature of any cargo carried hereunder, where such bonuses and extra wages are payable by the Owner to the Master, officers or crew in accordance with ship's articles or Owner's collective bargaining agreements.

(b) The Charterer shall also reimburse the Owner for all wages and bonuses of whatsoever kind payable by the Owner for any additional members of the Vessel's complement above the normal complement, if employment of such additional complement by the Owner becomes necessary as a result of the Vessel's service under this Charter or in order to provide for the extra personnel referred to in ARTICLE 1.02 of this Charter. 62

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in triplicate the day and year first above written.

CALMAR STEAMSHIP CORPORATION

By: H. W. WARLEY
President

(SEAL)

Attest:

MARK R. KREIDLER
Secretary 63

UNITED STATES MARITIME COMMISSION

By: E. S. LAND
Chairman

(SEAL)

Attest:

W. C. PEET, JR.
Secretary

Approved as to form:

FRANCIS B. GOERTNER
Assistant General Counsel
G. J. H.

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(Rev. XI. 13.41.)
T. C. Cargo
Government

PART II.

Exhibit A attached to Time Charter by United States Maritime Commission known as Contract 1915.

ARTICLE 2.01. The Vessel shall be placed at the disposal of the Charterer at the port of delivery at such safe ready
65 dock, wharf or place as the Charterer may direct. Any time lost by the Vessel awaiting the availability of such dock, wharf or place shall count as time on hire. The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and, as far as due diligence can make it so, tight, staunch, strong and in every way fitted for service, having water ballast, winches and power sufficient to run all the winches at one and the same time and a Master and a full complement of officers and crew for a vessel of her tonnage, and due diligence shall be exercised by the Owner to maintain her in such state during the currency of this Charter. The Vessel shall be employed in carrying
66 lawful merchandise, including petroleum or its products in proper containers, between safe ports or places, in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct.

ARTICLE 2.02. The whole reach and burthen of the Vessel's holds, decks, and usual places of loading (but not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only space proper and sufficient in the opinion of the Master for Vessel's officers and crew, Master's cabin, tackle, apparel, furniture, provisions, fresh water, stores and fuel.

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of

the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the casualty last occurring shall be the time when hire ceases. 68
Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time. The hire provided for in this Charter shall be due and payable on the first day of each calendar month for the preceding month or portion thereof. Unless otherwise provided in PART I hereof, the Charterer shall give the Owner not less than seven days' notice in writing of the Vessel's expected date and port of redelivery.

Cash for the Vessel's ordinary disbursements at any 69
port may be advanced as required by the Master, by the Charterer or its agents, and such advances shall be deducted from the hire. The Charterer shall not, however, be responsible for the application of such advances.

ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or

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(b) because of breach of orders or neglect of duty by the Master, officers or crew, or deviation to land any injured or ill person on board (except the additional personnel provided for in PART I hereof or any other person carried at the Charterer's written request or any person whose illness or injury is caused or contributed to by the war conditions listed in (ii) below)

Provided, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise
71 due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

(i) a deficiency of men arising from nonavailability of or difficulty in obtaining men for the Vessel's intended voyage, including difficulty caused by any demand for additional compensation based on the areas to be traversed during or the ports of call of such voyage, or based on other conditions connected with the intended voyage;

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused
72 or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; or

(iii) time lost (when the Vessel needs repairs necessary to her working) (1) due to a lack of available repair facilities in a port outside the continental

United States, or (2) due to the Vessel's having to leave a port outside the continental United States to go to another port for such repairs when the facilities for such repairs at the port so left would not have been available in the time required to proceed to and return from such other port; Provided, that this clause (iii) shall not affect any other provisions in this Charter as to the stoppage of hire while repairs are in progress.

The cost of fuel and water consumed while the Vessel 74
is off hire hereunder, as well as all port charges, pilotages and other expenses incurred during such period and consequent upon the putting into any port or place other than that to which the Vessel is bound, shall be borne by the Owner; but should the Vessel be delayed or driven into port or to anchorage by stress of weather or on account of accident to or other consideration for her cargo, such delay, departure, or loss of time, shall be for Charterer's account. Cleaning of boilers and overhauling of machinery whenever possible shall be done during service, but if impossible and without limiting other provisions of this Article, the Charterer shall give the Owner forty-eight hours in any two months for such work, which, at Charterer's 75
option, may be given in one period of forty-eight consecutive hours; should the vessel be further detained by reason of such cleaning of boilers or overhauling of machinery, hire shall cease for the time lost by such further detention. Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for.

ARTICLE 2.05. The Owner shall provide and pay for: all provisions; all galley, cabin, deck and engine room stores; fuel for cooking; wages of, and consular, shipping and discharging fees and other expenses pertaining to, the Master, Officers and Crew (except as herein otherwise

provided); 25% of all fresh water used by the Vessel if a steamer, or 75% if a motorship, all water ballast; and insurance (except as herein otherwise provided) on the Vessel.

ARTICLE 2.06. The Charterer shall (except as herein otherwise provided) provide and pay for: all fuel (except for cooking) 75% of all fresh water (except water ballast) if the Vessel is a steamer, or 25% if a motorship; all port charges, pilotages, light, dock, canal and other dues, steve-
77 doring, agencies, commissions, reasonable ballast, (except water ballast, and the cost of loading and discharging it); tug assistance and boating where incurred for the Charterer's business, and all other charges and expenses whatsoever except those which, by the terms of this Charter, are specifically made payable by the Owner.

Fumigations ordered because of illness of the crew shall be for the Owner's account. Fumigations ordered because of cargoes carried or ports visited while the Vessel is employed under this Charter shall be for the Charterer's account.

The Charterer shall provide necessary dunnage and shifting boards, also any extra fittings requisite for a spe-
78 cial trade or for the carriage of livestock or other unusual cargo, but the Owner shall allow the Charterer the use of any dunnage and shifting boards already aboard the Vessel. The Charterer shall have the privilege of using shifting boards for dunnage. The Charterer shall make good any damage to or shortage of shifting boards on board at delivery.

ARTICLE 2.07. The Charterer shall pay for 75%, if a steamer, or 25% if a motorship, of all fresh water in the Vessel's service tanks, and for all fuel in the Vessel's bunkers, upon delivery, and the Owner shall pay for 75% if a steamer, or 25% if a motorship, of all fresh water in the Vessel's service tanks, and for all fuel in the Vessel's

bunkers on redelivery, at current market prices of the ports of delivery and redelivery respectively.

ARTICLE 2.08. The Charterer shall be at liberty to install any equipment and make alterations and additions to quarters and equipment incident to the service in which the Vessel is to be used, and to install any additional gear or equipment for loading or discharging cargo beyond that on board at the beginning of this Charter. Such work shall be done at Charterer's expense and on its time, and shall not be such as to affect the seaworthiness of the Vessel or 80
the safety of the crew, or as to be in contravention of any applicable law of the United States or regulation made pursuant thereto. Such equipment, materials, and gear so fitted are to be considered Charterer's property; and the Charterer shall remove the same at its expense before redelivery, and shall restore the Vessel to her condition prior to such changes (ordinary wear and tear excepted).

ARTICLE 2.09. The Owner agrees at its expense to drydock the vessel, to clean and paint her bottom, at intervals of about every eight months and not less often than once every twelve months, unless the Charterer otherwise agrees, 81
and, when due, the Charterer agrees to send the Vessel to a port where she can so drydock and paint. In case of drydocking pursuant to this ARTICLE at a port where the Vessel is sent by the Charterer on its business, hire shall be suspended from the time the Vessel receives free pratique on arrival, if without cargo, or on completion of discharge of cargo, if she arrives loaded, until the Vessel is again ready for service. If the Owner sends the Vessel to a port (other than one designated by the Charterer) for such drydocking, hire shall be suspended from the time of the Vessel's arrival there at the sea buoy inbound until her departure from the sea buoy outbound. Hire shall not be suspended in either case for any time lost by the Vessel because of unavailability of drydock resulting from causes

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beyond the control of the Owner. All towage, pilotage, and other expenses incidental to the drydocking, and all port charges incurred and fuel and water consumed (to the extent such fresh water is to be provided or paid for by the Charterer) while hire is suspended as provided in this ARTICLE, shall be for the Owner's account.

ARTICLE 2.10. The Charterer shall furnish the Master from time to time with all requisite instructions and sailing directions, in writing, and the Master shall keep a full and correct log of the voyage or voyages, which shall be patent
83 to the Charterer or its Agents, and furnish the Charterer or its Agents, when required, with a true copy of daily logs, showing the course of the Vessel and distance run and the consumption of fuel.

ARTICLE 2.11. Subject always to the direction of the Charterer, the Master shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with Ship's crew and boats; and shall use due diligence in caring for and ventilating the cargo. The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency,
84 and prosecution of the voyages; and Charterer shall load, stow, trim and discharge the cargo at its expense under the supervision of the Master, who is to sign bills of lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts. The Master, officers and crew of the Vessel in supervising loading, stowing, trimming, tallying and discharging, shall be deemed the agents of the Charterer, except in so far as such supervision pertains to the safety of the Vessel. Bills of lading are to be signed at any rate of freight that Charterer or its agents may direct, without prejudice to this Charter. The Charterer hereby agrees to indemnify the Owner against all consequences or liabilities that may arise from the Charterer or its agents (including the Master) signing bills of lading or other documents incon-

sistent with this Charter, or from any irregularities in papers supplied by the Charterer or its agents. 85

The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter.

ARTICLE 2.12. Cargo may be laden or discharged in any dock or at any wharf or place that the Charterer or its agents may direct, provided that the Vessel can safely lie afloat at any time of tide. 86

The Vessel shall not be required to enter any ice-bound port or any port where there is risk that in the ordinary course of things the Vessel will not be able, because of ice, to enter the port safely or to get out after loading or discharging.

ARTICLE 2.13. The Owner shall provide and maintain gear for all derricks, which gear shall be capable of handling lifts up to the weight set forth in the preamble of this Charter, but heavier lifts shall be at Charterer's expense and responsibility. The Owner shall maintain the gear of the ship as fitted, and shall also provide ropes, falls and 87 blocks. The Owner shall also provide on the Vessel lanterns and oil for night work, and give the use of electric lights when the Vessel is so fitted. The Charterer shall have the use of any gear on board the Vessel, including slings.

ARTICLE 2.14. The Vessel shall work night and day, if required by the Charterer, and all winches to be at the Charterer's disposal during loading and discharging. Shore winchmen, where necessary, shall be provided and paid by the Charterer. In the event of a disabled winch or winches or insufficient power to operate winches unless resulting from causes specified under ARTICLE 2.04 (ii) hereof, the Owner shall pay for a shore engine, or engines, in lieu

94 *Exhibit A, Attached to Libel, Dated February 11, 1944.*

(iv) *Amended "Jason" Clause*

"In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the carrier is not responsible by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a
95 general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers.

(v) *War Clauses*

"In any situation whatsoever or wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the carrier or master is
96 likely to give rise to capture, seizure, detention, damage, delay or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port the master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may, without giving any prior notice, discharge the

goods into depot, lazarette, craft, or other place and the goods shall be liable for any extra expense thereby incurred; or the master may proceed or return, directly or indirectly, to or stop at such other port or place whatsoever as he or the carrier may consider safe or advisable under the circumstances, and discharge the goods or any part thereof there without giving any prior notice, and when landed as hereinabove provided, the goods shall be at their own risk and expense, the delivery thereof by the carrier shall be considered complete 98
and the carrier shall be freed from any further responsibility in respect thereof except to mail notice of the disposition of the goods directed to the shipper or consignee named in this bill of lading at such address as may be stated herein; or the master may retain the cargo on board until the return trip or until such time as he or the carrier thinks advisable; or the master may forward the goods by any means by water or by land, or by both such means, at the risk and expense of the goods. For any services rendered to the goods as hereinabove provided, the carrier shall be entitled to a reasonable extra compensation. 99

The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the

contract voyage. The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy."

ARTICLE 2.16. The Vessel, her Master and Owner, shall not unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless caused by the personal design or neglect of the Owner; collision, stranding, or peril, danger or accident of the sea or other navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer, the owner, shipper or consignee of the cargo, their agents or representatives; insufficiency of packing, insufficiency or inadequacy of marks; explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied; or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, pirates, or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion. The Vessel shall have liberty to sail with or without pilots, to tow or to be towed,

to go to the assistance of vessels in distress and to deviate for the purpose of saving life or property or of landing any ill or injured person on board. No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter.

ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent 104
voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured (ii) all war risk insurance, as required, on the lives of or for injuries to officers and crew and loss of or damage to their personal effects, including sextants of deck officers, or leased equipment aboard for which the Owner is responsible, and on slop chests; and (iii) war risk protection and indemnity 105
insurance, for the benefit of the Owner and the Charterer as their interests may appear, including Owner's liabilities to officers and crew until repatriated.

The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

ARTICLE 2.18. All salvage moneys earned by the Vessel shall be divided equally between the Owner and the Charterer, after deducting Master's, officers' and crew's share,

106 *Exhibit A, Attached to Libel, Dated February 11, 1944.*

legal expenses, hire of the Vessel during time lost, value of fuel consumed, repairs of damage, if any, and any other extraordinary loss or expense sustained as a result of the service, which shall always be a first charge on such monies.

General average, if any, shall be stated, settled and adjusted at such port or place in the United States as may be selected by the Owner, and in other respects in the manner provided for in Clause (iii) of Article 2.15 hereof. General average adjusters shall be appointed by the Owner,
107 from a list of adjusters satisfactory to the Charterer, and shall attend to the settlement and collection of the general average, subject to customary charges. If the Vessel should put into a port of distress or be under average, she is to be consigned to the Owner's agents who shall be satisfactory to the Charterer and shall be entitled to receive the usual charges and commissions.

ARTICLE 2.19. If the Charterer shall have reason to be dissatisfied with the conduct of the Master, Officers, or any member of the crew, the Owner shall, on receiving particulars of the complaint, investigate and make any changes necessary in the appointments.

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ARTICLE 2.20. Any provisions of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owner of vessels by any statute or rule of law for the time being in force.

ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer.

ARTICLE 2.22. Penalty for non-performance of this contract shall be proved damages.

ARTICLE 2.23. The Charterer shall have the option of subletting or assigning this Charter, but the Charterer shall

always remain responsible for the due fulfillment of this Charter in all its terms and conditions.

ARTICLE 2.24. The Charterer shall have a lien on the Vessel for all monies paid in advance and not earned.

ARTICLE 2.25. No member of or delegate to the Congress, nor Resident Commissioner, shall be admitted to any share or part of this Charter or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909. 110

ARTICLE 2.26. The Charterer (except as to matters affecting only the stability of the Vessel) shall be exclusively responsible for proper loading, stowage and discharge of goods of an inflammable, explosive or dangerous nature, and shall comply with all applicable regulations and furnish any necessary fittings.

ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department 111 thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; *provided, however*, that whenever any such orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions or other orders of the Charterer as to the employment of the Vessel hereunder, the Master shall, if practicable,

apply to the Charterer or its agents or to a representative of the Government of the United States for consent or advice and shall not comply with such orders or directions unless such consent or advice to comply is first obtained; provided further, however, that if it is impracticable in any case to act in accordance with the foregoing proviso, the Master's decision as to compliance with any such orders or directions shall be made with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel, her crew and cargo.

Answer.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Ad. 129-296.

The Answer of the Respondents United States of America, Emory S. Land, H. L. Vickery, Thomas M. Woodward, Edward Macauley and John M. Carmody, to the Libel and Complaint of Calmar Steamship Corporation, in an alleged cause of contract, civil and maritime, alleges:

To the First Cause of Action:

FIRST: On information and belief, respondents admit the allegations contained in Article First.

SECOND: On information and belief, respondents admit that at all the times mentioned in the libel, the United States of America was and still is a sovereign. They deny the remaining allegations of Article Second.

THIRD: Respondents admit that the individual respondents were at all the times mentioned in the libel, the duly appointed members of the United States Maritime Com-

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mission, as therein alleged, and that respondent Emory S. Land was the duly appointed Chairman of said Commission. Respondents deny the remaining allegations of Article Third, and expressly deny that the individual respondents are subject to suit herein.

FOURTH: On information and belief, respondents admit the allegations of Article Fourth, except that they deny that respondent Emory S. Land still is the duly appointed Administrator, and further allege that pursuant to law, the War Shipping Administration has ceased to exist.

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FIFTH: On information and belief, respondents admit the allegations of Article Fifth.

SIXTH: On information and belief, respondents admit the allegations of Article Sixth.

SEVENTH: On information and belief, respondents admit the allegations of Article Seventh, except that they deny knowledge or information sufficient to form a belief as to the orders given to the *Portmar* to proceed to Suva, Fiji Islands, and except, further, that respondents admit that the vessel was thus ordered to proceed by a competent military or naval authority.

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EIGHTH: On information and belief, respondents admit the allegations of Article Eighth.

NINTH: On information and belief, respondents admit that on February 15th and 16th the convoy was attacked by enemy bombers, but deny that the *Portmar* then suffered damage. Respondents further admit that an aerial attack was made by enemy bombers on the harbor of Port Darwin, on February 19th, and that the *Portmar* sustained damage, and that she afterwards, in the course of efforts by the master to beach the vessel, ran aground, and that the master and crew of the vessel abandoned her. Respondents deny that they have any knowledge or information sufficient to form a belief as to the remaining allegations of Article Ninth.

118 *Answer.*

TENTH: On information and belief, respondents admit the allegations of Article Tenth.

ELEVENTH: Respondents admit that after the *Portmar* was floated, she was towed to Brisbane for repairs, pursuant to towage arrangements made between the American military authorities and Commonwealth Salvage Board, and that she arrived there on July 29, 1942. Respondents further admit that she thereafter proceeded to the port of Sydney under her own steam, where she arrived on November 24, 1942. Respondents deny the remaining allegations
119 of Article Eleventh.

TWELFTH: On information and belief, respondents admit that the War Shipping Administration requisitioned title to, and took possession of the *Portmar* effective at 12:00 o'clock on November 17, 1942 Eastern Australian Time, while the vessel was then at Brisbane, and still in a damaged condition. Respondents deny the remaining allegations of Article Twelfth.

THIRTEENTH: Respondents deny the allegations contained in Article Thirteenth, except that they admit that on or about February 13, 1943 a survey of the SS. *Portmar*
120 was held at which respondents were represented.

FOURTEENTH: On information and belief, respondents admit that hire was paid in full up to the 1st day of March, 1942, but allege that no hire was due for the said vessel subsequent to February 19, 1942, and that payment for the period from February 20 to March 1, 1942 was due to errors of fact and law on the part of respondents' representatives and not binding on the respondents. Respondents admit that no payment of hire in any amount has thereafter been made, but has been and still is refused, Respondents deny the remaining allegations of Article Fourteenth.

FIFTEENTH: On information and belief, respondents deny the allegations of Article Fifteenth, except that they admit that no part of the sum of $345,591.00 has been paid.

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Further Answering and as a First Separate and Complete Defense to Libellant's First Alleged Cause of Action, Respondents Further Allege, on Information and Belief:

SIXTEENTH: Libellant, after the bombing of the *Portmar* at Port Darwin on February 19, 1942, failed to exercise due diligence to keep the vessel working and to prevent loss of time, in that, among other things, the master and crew of the *Portmar* abandoned the vessel without just cause. As a result, the vessel was looted by persons who obtained access to her in her abandoned condition and stripped of a great quantity of equipment, including all navigation instruments and all other equipment necessary to the operation of the *Portmar* as a merchant vessel. The master, officers and crew of the *Portmar* further failed to take any measures whatever to salvage the vessel and restore her to a condition for further service under the charter.

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SEVENTEENTH: By reason of the foregoing, respondents are not liable for any charter hire subsequent to the bombing of the vessel on February 19, 1942.

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Further Answering and as a Second Separate and Complete Defense to the Libellant's First Alleged Cause of Action, Respondents Further Allege, on Information and Belief:

EIGHTEENTH: Respondents repeat the allegations of Articles Sixteenth and Seventeenth hereof, with the same force and effect as if here set forth at length.

NINETEENTH: By reason of the bombing of the vessel and the subsequent looting and stripping of the vessel after she was abandoned by her master, officers and crew, the *Portmar* ceased to be and lost her character as a merchant vessel for which she was chartered to the respondent United States of America, and respondents are therefore not liable for charter hire beyond February 19, 1942.

124 *Answer.*

Further Answering and as a Third Separate and Complete Defense to Libellant's First Alleged Cause of Action, Respondents Further Allege:

TWENTIETH: In the event that the Court should conclude, contrary to the contentions of respondents as set forth in Articles Sixteenth to Nineteenth of this Answer, that the owner of the *Portmar*, her master, officers and crew did not fail to use due diligence to keep the vessel working and to prevent loss of time, respondents alternatively allege that as a result of the bombing of the *Portmar* on
125 February 19, 1942 and the conditions then prevailing at Port Darwin, the *Portmar* became and was a constructive total loss and, under the provisions of Article 2.03 of the charter, respondents are not liable for charter hire subsequent to February 19, 1942.

For a Fourth Separate and Complete Defense to Libellant's First Alleged Cause of Action, Respondents Further Allege:

TWENTY-FIRST: Subsequent to the bombing of the *Portmar*, the possession and complete control of the vessel was
126 taken over by the military authorities of the United States of America for the use of the vessel in the prosecution of the war, and as a result thereof, the charter agreement between the United States of America and libellant was brought to an end and frustrated.

To the Second Cause of Action:

TWENTY-SECOND: Respondents reallege their admissions and denials with respect to Articles First to Thirteenth of the libel, as realleged in Article Sixteenth of the libel, with the same force and effect as if here set forth at length.

TWENTY-THIRD: On information and belief, respondents admit the allegations of Article Seventeenth.

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TWENTY-FOURTH: On information and belief, respondents admit the allegations of Article Eighteenth.

TWENTY-FIFTH: On information and belief, respondents admit that the vessel was required to sail from Port Darwin toward Koepang, Timor, under the direction of the Commander of the USS. *Houston*. Respondents deny that they have any knowledge or information sufficient to form a belief as to whether libellant then had any opportunity to place any new insurance on said vessel. Respondents deny the remaining allegations of Article Nineteenth.

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TWENTY-SIXTH: On information and belief, respondents deny the allegations of Article Twentieth.

TWENTY-SEVENTH: On information and belief, respondents deny the allegations of Article Twenty-first.

TWENTY-EIGHTH: On information and belief, respondents deny the allegations of Article Twenty-second.

To the Third Cause of Action:

TWENTY-NINTH: Respondents repeat the admissions and denials with respect to Articles First to Thirteenth of the libel, inclusive, as realleged in Article Twenty-third of the libel, with the same force and effect as if here set forth at length.

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THIRTIETH: On information and belief, respondents deny the allegations of Article Twenty-fourth, except that they admit that when the vessel was ordered to sail from Port Darwin in convoy and to return to Port Darwin she was subjected to violent enemy attack and bombardment and that libellant sustained and incurred damage. Respondents specifically deny that the orders and directions of the naval and military authorities were or are binding on these respondents.

THIRTY-FIRST: On information and belief, respondents deny the allegations of Article Twenty-fifth.

130 *Answer.*

THIRTY-SECOND: On information and belief, respondents deny the allegations of Article Twenty-sixth.

THIRTY-THIRD: On information and belief, respondents deny the allegations of Article Twenty-seventh.

THIRTY-FOURTH: On information and belief, respondents deny the allegations of Article Twenty-eighth.

Further Answering, and as a Set-off Against Any Amounts Which Libellant May Be Entitled to Recover on Account of the Matters Alleged in the
131 *Libel, Respondents Further Allege, on Information and Belief:*

THIRTY-FIFTH: Respondents repeat the allegations of the foregoing articles of this Answer with the same force and effect as if hereafter set forth at length.

THIRTY-SIXTH: Any payments made to libellant as alleged in Article Fourteenth of the libel, for the period of February 20 to March 1, 1942, were due to errors of fact and law and are not binding upon the respondents.

WHEREFORE, respondents pray that the libel herein may
132 be dismissed with costs, and that respondents may have such other and further relief as to the Court may seem proper.

JOHN F. X. MCGOHEY,
United States Attorney,
Proctor for Respondents,
Office and P. O. Address:
45 Broadway,
Borough of Manhattan,
City of New York.

Libel, Dated November 10, 1944.

133

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

The libel and complaint of CALMAR STEAMSHIP CORPORATION, a Delaware corporation, libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters, 134

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters, 135

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,

Respondents.

A133-332.

In a cause of Contract and War Risk Insurance, civil and maritime, alleges on information and belief as follows:

For a First Cause of Action:

FIRST: At all times hereinafter mentioned, libelant was and still is a corporation duly organized and existing under

136 *Libel, Dated November 10, 1944.*

and by virtue of the laws of the State of Delaware, with its principal office and place of business at 25 Broadway, Borough of Manhattan, City and State of New York, within this District and within the jurisdiction of this Honorable Court, and was the owner of the Steamship *Portmar*, a vessel registered under the laws of the United States.

SECOND: At all times hereinafter mentioned SS. *Portmar* was a single screw ocean cargo steamship of 8600 tons deadweight capacity, built in 1919, and until the casualties hereinafter described maintained by libelant in Class
137 ✠ 100 A-1 with Lloyds Register of Shipping. Her tonnage was gross 5551; net 3418. Her dimensions were: length, 409.8′; beam, 54.2′; depth, 27.7′. She was equipped with triple expansion three-cylinder engines and was manned, victualed, supplied, operated and navigated by libelant.

THIRD: As of November 21, 1941, libelant chartered said SS. *Portmar* to the United States of America, by and through the United States Maritime Commission, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports. Said
138 charter, which will be produced at the trial, contained among others, the following provisions:

> "ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions any-

thing is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; *provided, however,* that whenever any such orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions or other orders of the Charterer as to the employment of the Vessel hereunder, the Master shall, if practicable, apply to the Charterer or its agents or to a representative of the Government of the United States for consent or advice and shall not comply with such orders or directions unless such consent or advice to comply is first obtained; provided further, however, that if it is impracticable in any case to act in accordance with the foregoing proviso, the Master's decision as to compliance with any such orders or directions shall be made with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel, her crew and cargo."

FOURTH: On or about January 19, 1942, in London, England, respondent Sydney Keith Scott and other Underwriting Members of Lloyds, London, who are Members of Syndicates, Subscribers to Policy No. D41/11356, a copy of which is hereto attached, marked Schedule A and hereby made a part of this libel, and whose names and Definitive Numbers of Syndicates are set forth in said policy, and who have agreed to abide by the result of this litigation, issued said policy and caused libelant to be insured in the amount of Seven Hundred and Fourteen Thousand United States Dollars ($714,000), upon among other things, the hull, machinery, tackle, apparel, ordnance, munition, artillery, boat and other furniture of said Steamship *Portmar,* lost or not lost, valued at Eight Hundred and Sixty Thousand United States Dollars ($860,000), at and from a United States Pacific port to port or ports in the Philippine Islands,

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whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order and for 24 hours after arrival, only against the risks of war, strikes, riots and civil commotions as per American Form attached to said policy.

FIFTH: On or about January 19, 1942, in London, England, respondents, Edinburgh Assurance Co. Ltd., Northern Maritime Insurance Co. Ltd., Fine Art & General Insurance Co. Ltd., British Law Insurance Co. Ltd., Planet
143 Assurance Co. Ltd., Elders Insurance Co. Ltd. and National Provincial Insurance Co. Ltd., said respondents being Members of the Institute of London Underwriters, subscribers to a policy also bearing No. D41/11356, and whose names and proportions are set forth in said policy, and who have agreed to abide by the result of this litigation, issued said policy in form similar in all material respects to that alleged in Article FOURTH hereof and thereby caused libelant to be insured in the amount of One Hundred Sixteen Thousand United States Dollars ($116,000) upon among other things, the hull, machinery, tackle, apparel, ordnance, munition, artillery, boat and other furniture of said Steamship *Portmar,* lost or not lost, valued at Eight Hundred and
144 Sixty Thousand United States Dollars ($860,000), at and from a United States Pacific port to port or ports in the Philippine Islands, whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order and for 24 hours after arrival, only against the risks of war, strikes, riots and civil commotions as per American Form attached. Said policy will be produced at the trial.

SIXTH: On or about January 19, 1942 in London, England, respondent, Excess Insurance Company Limited, subscriber to Policy also bearing number D41/11356, and which has agreed to abide by the results of this litigation, issued said policy in form similar in all material respects to that

alleged in Article FOURTH hereof, and thereby caused libelant to be insured in the amount of Thirty Thousand United States Dollars ($30,000) upon, among other things, the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of said Steamship *Portmar*, lost or not lost, valued at Eight Hundred and Sixty Thousand United States Dollars ($860,000), at and from a United States Pacific port to port or ports in the Philippine Islands, whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order and for 24 hours after arrival, only against the risks of war, 146
strikes, riots and civil commotion as per American Form attached. Said policy will be produced at the trial.

SEVENTH: Said policies, described in Articles FOURTH, FIFTH and SIXTH hereof, contained among other things, the following provisions:

> "Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, * * * and of all other like perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c., or any 147
> part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. * * *"
>
> * * * * * * *
>
> "Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to $4,850, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found."
>
> * * * * * * *

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"No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account."

149 "F. C. & S. CLAUSE

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or
150 civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions

or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention."

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WAR RISK CLAUSES

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines 153 and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and without deduction of new for old.

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The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

* * * * * *

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

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Libelant reserves the right to refer to any and all of the provisions of said policies in addition to those set forth above, as same may become relevant or material to the issues of this cause.

EIGHTH: On November 28, 1941, pursuant to said charter the *Portmar,* being then seaworthy in all respects and fit for the voyage called for by said charter, sailed from San Francisco, with a cargo of military supplies and equipment, bound for Manila, Philippine Islands, and followed that voyage until December 11, 1941, when she was ordered by the Commandant of the Twelfth United States Naval
156 District to put in to Suva, Fiji Islands, there to await orders from the British Naval authorities. The Master of the *Portmar* obeyed said orders and on arrival at Suva reported to the British Naval Control Officer. On December 22, 1941 he was ordered by the British Naval Control Officer to proceed to Sydney, Australia, which order he obeyed. The *Portmar* arrived at Sydney on December 30, 1941 and her Master there reported to the Australian Naval Control Officer, who ordered the vessel to proceed to Brisbane and there discharge part of her cargo. In compliance with said order, the *Portmar* proceeded to and arrived at Brisbane on January 5, 1942, and there discharged a portion of her cargo designated by the Australian Naval Control Officer at that port. Said officer then ordered the *Portmar* to proceed to

Port Darwin with the remainder of the cargo, which order was obeyed and the *Portmar* arrived at Port Darwin on January 19th. The Master reported to the Australian Naval Control Officer, who ordered the *Portmar* to discharge the remainder of the cargo so soon as a berth at the jetty was available. Pursuant to said order the *Portmar* remained at anchor for several days awaiting berth, and then moved into berth and discharged the remainder of her cargo, except 1500 drums of gasoline which her Master was ordered by the Australian Naval Control Officer to retain on board.

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NINTH: On or about January 26, 1942, on receipt of information as to the movements of the vessel as aforesaid, libelant caused respondents to be notified that the *Portmar* had been diverted to Australia on the outward voyage under Government orders, and requested that respondents hold the *Portmar* covered pending further advices. Respondents thereupon agreed to hold the *Portmar* covered in accordance with libelant's request.

TENTH: After the events alleged in Article EIGHTH hereof, the Master was ordered by the Australian Naval Control Officer at Port Darwin to reload 500 drums which had been discharged, and to proceed to Wyndham, Western Australia, and discharge all the drums on board, and to return to Port Darwin. Pursuant to said order the *Portmar* sailed from Port Darwin on February 4, 1942 and on February 8, 1942 arrived at Wyndham. The *Portmar* there discharged all cargo on board, and then, pursuant to orders as above stated, returned to Port Darwin, arriving there on February 12, 1942. At 1:00 A. M. on February 13, 1942, the Australian Naval Control Officer at Port Darwin ordered the *Portmar* to berth at daylight, and on the 13th and 14th of February the *Portmar*, pursuant to orders given by military authorities of the United States, and with the cooperation of the Australian Naval Control Officer, loaded on board the *Portmar* military equipment, stores and troops,

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including approximately 300 officers and men of the 148th United States Field Artillery Regiment. At about 9:30 P. M. on February 14th the Master was ordered by the Australian Naval Control Officer to report on board the U.S.S. *Houston,* and there received orders from the Commanding Officer of the U.S.S. *Houston* and from the Australian Naval Control Officer to proceed in convoy under the former's command. At 1:30 A. M. on February 15th, the *Portmar* left Port Darwin in convoy with other vessels under the command of the Commanding Officer of the U.S.S.
161 *Houston,* and proceeded towards Koepang, Timor.

ELEVENTH: On February 15th and 16th said convoy was attacked at sea by enemy bombers, and the *Portmar* suffered damage by the effect of bombs falling into the sea near the vessel. In consequence of said attack the convoy was ordered to and did return to Port Darwin, arriving there about noon, February 18th, 1942. At about 9:55 A. M. on February 19th an aerial attack was made by enemy aircraft on the harbor at Port Darwin, and in such attack the *Portmar* sustained further and extensive damage, both on deck and below. The hull was pierced in many places, above and below the water line by aerial fire
162 and bomb fragments and the ship began to take in water through the holes below the water line. Both standard and steering compasses were put out of action by aerial fire or bomb fragments. Fire broke out in No. 4 and 5 holds, but was brought under control. Being unable to keep the water down by pumping, and as the ship was taking a severe list, the Master decided to beach the vessel. While searching for an advantageous place, having no compass to assist in navigation, the *Portmar* ran aground at 2:12 P. M., on February 19th, 1942, on the starboard side from amidships to stern on the south side of a small cove south of Channel Island in about 11 or 12 feet of water. Efforts were made to plug holes in the hull made by bomb fragments and aerial fire, but the water in the vessel increased

until she took a list of about 40°, and the Master, in view of the danger of capsizing, gave orders for the crew to leave the ship. The members of the crew were removed and detained in restricted areas by the military authorities but the Master with three members stood by the vessel until February 21st, at which time the after decks were completely submerged at high tide. On that day the Master ordered the starboard anchor lowered in order to hold the ship in case of a high rise of the tide. On February 23rd the Master returned to the vessel and remained on board overnight and on February 24th. Again on March 2nd and 164
3rd the Master returned to the vessel and found that she had settled further by the stern, until the water completely covered the poop deck.

TWELFTH: Thereafter the Master, officers and crew were held by the military authorities and on March 10th were sent overland across Australia to Melbourne, and they arrived at Melbourne on March 22, 1942. Later the officers and crew, except the Master, were returned to the United States. At libelant's instructions the Master remained in Australia in the interest of the vessel until March 6, 1943, devoting his entire time and attention to all matters within 165
his control affecting the interests of the vessel and respondents.

THIRTEENTH: After the Master left the vessel and was detained by the military authorities as aforesaid, salvage operations for the raising and restoration of the *Portmar* were undertaken by Captain John Protheroe Williams, Managing Director of United Salvage Proprietary Limited, incorporated in the State of Victoria for the purpose of rendering salvage services. Captain Williams was also duly appointed chief salvage officer of the Commonwealth Salvage Board, an agency of the Australian Government created for the purpose of rendering aid in the salvage of vessels in Australian waters. These services, with expert

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divers and workmen, were diligently prosecuted until on or about the 5th day of April, 1942, when the vessel was floated, and with the aid and assistance of a vessel provided by the local naval authorities was removed to a berth or anchorage at Port Darwin.

FOURTEENTH: On April 8, 1942, the condition of the SS. *Portmar* was that even though lying afloat at Port Darwin she was seriously and extensively damaged as to hull, machinery and equipment by reason of said enemy
167 attacks and consequent grounding of said vessel. Among other particulars of damage, the following existed:

The entire hull had been subjected to terrific shock and vibration by the concussion of bombs falling near the vessel.

The hull and superstructure were pierced and shattered by bomb fragments and by aerial fire in said enemy attacks.

The seams, frames and boiler saddles showed indications of movement due to the shock of the bombs.

The port side of the ship, above and below the
168 water line, was riddled for the whole length of No. 4 and 5 holds with holes measuring from about one inch in diameter up to irregular and jagged openings of about five inches across.

The ship had lain aground at Port Darwin, as above described, from February 19th until April 5th, 1942, her holds, engine room and fireroom being filled with sand, fuel oil which escaped from her bunkers and double bottoms, and indiscriminate muck and debris.

More than half the ship, from the bridge to the stern, including engine and boiler rooms, had been submerged at high water while she lay aground at Port Darwin twice daily. The ship, while thus partially sunk had rested on her starboard side aft, but

with a heavy list to port. The forward end of the ship was always afloat and rising and falling with the range of the tide of nearly 20 feet. It was strongly indicated there had been a severe strain on the whole structure of the hull over a period of about seven weeks.

The interior condition of the engines was unknown and could not be ascertained. The exterior of the engines showed extensive corrosion in bearings, journals, etc. and bearings, pistons and valves seized. Link motion, eccentrics and valves were frozen. 170

The shaft alley was inaccessible, being filled with fuel oil, mud, dirt and water. It was impossible to ascertain the condition of the hull or of the propeller shaft in that area. It was impossible to disconnect the shaft couplings. It was later found that the propeller shaft had been thrown out of line, the shaft seized in the bearings, the journals and shaft pitted.

The condenser was fouled on both steam and water sides.

The electric wiring throughout the ship was badly damaged.

Asbestos covering on the feed lines and piping in the interior of the vessel was shattered and fallen away. 171

Bilge lines on the port boiler were shattered at each of two flange unions; bilge lines and shaft alley had become clogged with loosened scale.

The bilge line of No. 4 hold was fractured.

There was damage by fire in Nos. 4 and 5 holds.

In Nos. 4 and 5 holds and tween decks all woodwork, ceiling, cargo battens and hatches were found damaged beyond repair by fuel oil, and the sides, bulkheads, tank tops and bilges were covered and filled with fuel oil and mud.

The accommodations in both forward and amidships houses were completely demolished and shat-

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tered; the ceiling, paneling and wainscoting and doors were blasted and torn from their places and all furniture, lockers, cabinets and shelves scattered and damaged.

Crew's quarters aft in the poop with all fittings and furnishing therein were damaged beyond repair by fuel oil and long submersion in muddy water.

The ice machine was damaged by gun fire and all woodwork and insulation in the refrigerating room and chilling chamber had been damaged beyond repair.

173

The steel decks forward and aft showed perforations and dents from machine-gun fire and on the poop the rails, chocks, and leads were shattered and shot away.

The boat and bridge decks were holed and splintered and the engine room skylight and fiddley were riddled by machine-gun fire as well as the funnel, fire room and engine room ventilators.

The wooden boat deck and bridge deck were shrunk and leaking by not having had any water on them for a long interval in the tropical climate.

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Most of the cargo booms showed bullet holes and fragment damages. Much of her standing and running cargo gear was broken by gun fire.

Three of the booms had fallen to the deck because their topping lifts were shot away, causing further damage to the boom and decks.

One of the booms at No. 4 hold fell, carrying away the ladder to the boat deck and damaging the radio house.

The booms at No. 3 and 5 carried away permanent awnings and awning spars.

The radio house, which also contained the ship's hospital, was blasted off its foundation and part of its sides blown out.

The standard and steering compasses were wrecked by enemy fire and the port engine telegraph shot away. 175

The telemotor piping was badly damaged.

The poop mooring telegraph was shattered and the sounding machine was blasted off in the middle of the column.

The life boats on deck were riddled by machine-gun fire, and steam lines on deck were shattered and riddled by machine-gun fire. The davits were badly damaged, the falls either missing or destroyed. 176

Her steering engine was damaged.

An extensive amount of portable gear and equipment had been removed from the vessel by persons unknown and without any authority to do so from the Master or libelant.

FIFTEENTH: There were not any facilities for drydock or repair of the vessel at Port Darwin. The nearest port at which even temporary repairs could be made was the port of Brisbane on the East Coast of Australia, about 1800 miles away. There were no drydock facilities at Brisbane large enough to accommodate the vessel. It was plain that the *Portmar* would have to go to Sydney for drydocking and permanent repairs. The vessel was unable to move to Brisbane from Port Darwin under her own steam. There was no indication that any vessels were available for such a tow. Such a tow from Port Darwin to Brisbane had to pass through a considerable area which was regularly patroled by the Japanese Navy and aircraft. During the inevitable delay necessary to accomplish the arrangements for the towage, if towage could be arranged at all, the vessel would have had to remain at Port Darwin, where she was under constant danger of further enemy attack and possibly complete destruction. A full scale Japanese invasion was expected at any moment. It was strongly indicated that even though the vessel were brought to Brisbane 177

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or to Sydney, the repair facilities there located were so occupied with allied Government work that it might be difficult, if not impossible, to secure shipyard or drydock space for the ship. It was indicated that the salvors who had released the vessel from the strand and placed her afloat at Port Darwin would make a substantial claim for salvage award. Such a claim was thereafter intimated in the sum of £100,000 Australian. The cost of repairs necessary to restore the vessel to her condition before the enemy attacks and her classification in Lloyds Register of Shipping, as aforesaid, were later estimated at £120,000 Australian. The cost of towage from Port Darwin to Brisbane for temporary repairs in order to put the vessel's engine in condition so that she might move to Sydney for drydocking and permanent repairs, if such towage could be obtained, was indicated at fantastic sums. Even after the tow had later been accomplished, it was stated by a representative of the United States Government to have cost £32,403 Australian. It was also reasonably anticipated that survey fees and legal fees, costs and expenses would have to be incurred in connection with repairs, reequipment and restoration to class of the vessel and the adjudication of the pending claim for salvage award.

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SIXTEENTH: Under the circumstances aforesaid, and in view of the insured value of the vessel of $860,000 which, at exchange 3.25 was equivalent to £264,615 Australian, having in mind the expenses and charges already reasonably incurred and yet to be anticipated if there was to be any recovery, repair, reequipment and restoration of said vessel to her condition and class as before the enemy attacks aforesaid; the danger of total loss by further enemy attack while at Port Darwin or during about 1800 miles of towage through waters patroled in large part by Japanese sea and air forces; the high probability that even though towage to Brisbane or Sydney could be arranged, it might not be possible to obtain shipyard and dry-dock

space for the vessel; the high probability that the cost of the towage, salvage award, permanent and temporary repairs, reconditioning, reequipment, survey fees, legal fees, expenses of supervision and all expenses of like nature necessary to recover, repair and restore the vessel to her sound condition and class as before the enemy attacks aforesaid would exceed the total of her insured value stated in said policies, libelant, on the 8th day of April, 1942, through its London brokers, Thomas Stephens & Sons, Ltd., gave notice of abandonment under its policies or war risk insurance, to respondents, and claimed a 182
constructive total loss of said vessel. Respondents declined to accept the abandonment but agreed that libelant would be held to be in the same position as if writs had issued on April 8, 1942 in connection therewith.

SEVENTEENTH: On or about January 8, 1943 respondents informed libelant's broker, Thomas Stephens & Sons, Ltd., London, that they had given further very careful consideration to this case and had taken legal opinion on the facts, and requested said Thomas Stephens & Sons, Ltd. to state to libelant their conclusions as follows: That the facts disclosed that after arrival in Australia, the vessel 183
discharged her outward cargo and thereafter operated under the orders of the military authorities; that it was in the course of these operations on a series of local voyages to and from Port Darwin that she became a casualty; that these voyages were not even performed as a result of the owner's decision and quite clearly represented an entirely fresh series of adventures which could by no stretch of imagination be considered as having anything whatever to do with the venture originally insured or with the extension of the insurance to cover the diversion of the vessel to Australia; that whether it be held that respondents' liability terminated on arrival of the vessel in Australia or when she discharged her outward cargo or when she was ordered into service by the military authorities seems

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immaterial for, whichever it be, they were definitely persuaded that all liability under their policies had terminated prior to the casualty; that they therefore requested Thomas Stephens & Sons, Ltd. to make it clear that they must, with regret, finally decline any liability in connection with this loss.

EIGHTEENTH: In consequence of respondents' refusal to accept abandonment tendered as aforesaid, libelant was forced to and did reasonably incur sundry heavy expenses
185 in the interest of said vessel and of respondents which it would not have incurred if said tender of abandonment had been accepted by respondents. These expenses were as follows:

Salvage award paid to United Proprietary Limited and John Protheroe Williams, pursuant to decree of the High Court of Australia in Admiralty, Docket No. 23, judgment rendered November 19, 1943, with costs	$20,608.63
Legal fees and expenses in connection with defense of said salvage suit in
186 Australia and also in obtaining necessary statements from the Master, officers and crew of the *Portmar* which libelant has either paid or has become liable to pay in a total sum now estimated at	7,500.00
Expenses of the Master of the *Portmar* in Australia pursuant to the Sue and Labor Clauses of said policies, in order to devote himself to the care and safety of said vessel and to all matters pertaining thereto, all in the interests of said vessel and of respondents as war risk underwriters of said vessel	13,152.49
Cables and miscellaneous expenses	1,500.00
	$42,761.12

NINETEENTH: The premium stipulated in each of said policies of war risk insurance was duly paid to the respective respondents on behalf of libelant, and was accepted by said respondents, and libelant has performed each and all of the obligations on its part to be performed under and pursuant to said policies of war risk insurance, or otherwise in the premises.

TWENTIETH: By reason of the premises, SS. *Portmar* was, on the 8th day of April, 1942, a constructive total loss and the abandonment made as of that date to respondents 188
was a valid abandonment; and thus on April 8, 1942 there became due and owing to libelant from respondents, according to their several undertakings under said policies of war risk insurance, as and for a constructive total loss of said vessel, a sum aggregating the amount of $860,000; and in addition thereto, there later became due and owing to libelant in like manner from respondents the further sum of $42,761.12 by reason of the matters alleged in Article EIGHTEENTH hereof, making a total sum of $902,761.12, and said total sum remains and is now due and owing to libelant from respondents as aforesaid with interest and costs. No part of said sum has been paid to libelant by respondents 189
although due demand has been made therefor.

For a Second Cause of Action.

TWENTY-FIRST: Libelant here realleges each and all of the matters alleged in Articles marked FIRST to FOURTEENTH, inclusive, of this libel, with the same force and effect as if here in full set forth.

TWENTY-SECOND: After the *Portmar* was floated on April 5, 1942, she was handed over by the salvors to the shipping authorities at Port Darwin. By reason of the extensive damage to said vessel caused by enemy action, as aforesaid, and because there were not any facilities for dry-dock

and repair of the vessel at Port Darwin, it was necessary to tow said vessel from the point where she lay in the harbor of Port Darwin after said enemy attacks, to the nearest port where repairs might be effected, Brisbane, on the East Coast of Australia. Libelant is informed that the contract or agreement for said towage was made by or on behalf of the Commonwealth Salvage Board, an agency of the Australian Government, and that the cost of said towage was guaranteed by the military authorities of the United States in Australia. Libelant is not informed as to the cost of said towage nor as to whether or not said towage has been paid for, but libelant is now informed that the actual cost of said towage was the sum of £16,700 Australian, equivalent to $54,275.00.

TWENTY-THIRD: The *Portmar* arrived at Brisbane on July 29, 1942. Surveys were held and temporary repairs were made at that port as soon as practicable. No dry-dock large enough for the *Portmar* nor facilities for the necessary permanent repairs were there available.

TWENTY-FOURTH: On or about August 24, 1942 libelant was informed that the Commonwealth Salvage Board had made claim of £100,000 Australian for salvage of SS. *Portmar* and that suit against the *Portmar* was threatened by said Salvage Board as well as by said United Salvage Proprietary Limited and said Captain John Protheroe Williams. Thereupon libelant proposed to respondents that libelant should take steps deemed advisable to defend action in Australia for excessive salvage demands against the *Portmar* without prejudice to any party respecting rights or liabilities under said policies. Respondents thereupon agreed to libelant's proposal, without prejudice, and pursuant to such agreement, libelant employed attorneys in Australia for defense of such claims and actions.

TWENTY-FIFTH: On November 17, 1942 at 12 o'clock noon Eastern Australian time, the United States of Amer-

ica, acting by and through the War Shipping Administrator, requisitioned title to, and took possession of, the *Portmar*. The vessel was then at Brisbane, still in damaged condition, as the repair of the damage had not theretofore been possible. After said requisition, and temporary repairs to the hull and engines of the vessel at Brisbane, secured by the United States military authorities, the *Portmar* proceeded to the port of Sydney under her own steam.

TWENTY-SIXTH: On or about November 20, 1942, while SS. *Portmar* was proceeding from the port of Brisbane to the port of Sydney for dry-docking, survey and permanent repairs, respondents appointed a surveyor at Sydney, Australia, and instructed him to participate in a joint survey of SS. *Portmar* to estimate the cost of repairs, without prejudice to the position of respondents.

TWENTY-SEVENTH: The *Portmar* arrived at the port of Sydney on November 23, 1942. Thereafter a joint survey of said vessel was held by surveyors representing libelant and respondents as well as War Shipping Administration. Said survey was held both afloat and in dry-dock in Sydney pursuant to arrangements made by the United States military authorities. On February 15, 1943 said surveyors reported to all the interested parties that the cost of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Port Darwin in February 1942, as aforesaid, would amount to £28,000 Australian, equivalent to $91,000.

TWENTY-EIGHTH: Libelant here realleges each and all of the matters contained in Article SEVENTEENTH hereof, with the same force and effect as if here in full set forth.

TWENTY-NINTH: On or about February 13, 1943 United Salvage Proprietary Limited and John Protheroe Williams instituted suit *in rem* against the *Portmar* in the High

Court of Australia, in Admiralty, Docket No. 24, claiming a salvage award of £50,000 Australian by reason of salvage services rendered to the *Portmar* following the enemy attacks hereinbefore described. Thereafter said Commonwealth Salvage Board brought suit against Calmar Steamship Corporation *in personam* in the same Court, Docket No. 25, to enforce its claim for salvage award for services rendered to the *Portmar* after said enemy attacks. Pursuant to said agreement with respondents as to defense of such salvage claims, libelant defended said salvage
197 actions and caused the testimony of witnesses to be taken, including the testimony of the Master of the *Portmar* in defense of said claims. On November 19, 1943 said Court rendered judgment in said salvage proceedings allowing said United Salvage Proprietary Limited and said John Protheroe Williams a salvage award in the sum of £5,000 Australian with costs, but dismissing the claim of said Commonwealth Salvage Board with costs. Libelant has been obliged to, and has, satisfied the decree entered in favor of said United Salvage Proprietary Limited and said John Protheroe Williams with costs, in the sum of $20,608.63. In the course of said proceedings, libelant incurred legal fees, counsel fees and other expenses which
198 libelant has either paid, or is liable to pay, in a sum now estimated at $7,500.

THIRTIETH: In addition to the clauses of said policies hereinbefore quoted, said policies contained the following provisions:

> "* * * And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and

agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment."

Pursuant to said Sue and Labor Clauses of said policies, the Master of the *Portmar* was instructed by libelant to remain in Australia and to devote himself to the care and safety of said vessel and to all matters pertaining thereto, all in the interests of said vessel, and of respondents as war risk underwriters of said vessel. In addition thereto, after the *Portmar* had been placed on dry dock at Sydney and surveyed, as aforesaid, said salvage suits were instituted and it was necessary for the Master to remain in Australia to give testimony on behalf of the *Portmar* as a witness in said actions. These matters occupied the attention of the Master of the *Portmar* and required him to remain in Australia until March 6, 1943, when he returned to the United States. The expenses necessarily and reasonably incurred by libelant in maintaining the Master of the *Portmar* in Australia as aforesaid, and the cost of the Master's transportation from Melbourne, Australia, to New York, N. Y., amounted to the sum of $13,152.49.

THIRTY-FIRST: As a result of said enemy attacks on the *Portmar*, libelant was obliged to pay, and reasonably and necessarily incurred, sundry additional expenses in survey fees, the cost of cable messages and miscellaneous incidentals amounting to a sum now estimated at $1,500.

THIRTY-SECOND: Libelant is not informed as to the extent of temporary repairs effected as of the date and time of said requisition nor as to the extent of repairs or re-equipment of said vessel, if any, accomplished thereafter, nor as to the cost thereof.

THIRTY-THIRD: The premium stipulated in each of said policies of war risk insurance was duly paid to the respec-

tive respondents on behalf of libelant, and was accepted by said respondents, and libelant has performed each and all of the obligations on its part to be performed under said policies of insurance or otherwise in the premises.

THIRTY-FOURTH: In the event that it should appear that the notice of abandonment delivered by libelant to respondents as alleged in Article SIXTEENTH hereof, was not a valid notice of abandonment under all the circumstances and that therefore respondents were entitled to reject said abandonment, then by reason of the premises, libelant is entitled to
203 recovery of and from respondents, as and for a partial loss with respect to the SS. *Portmar* as insured under said policies of insurance, by reason of each and all of said several damages, costs and expenses suffered, borne and incurred by SS. *Portmar* and by libelant in the sum of $250,000 with interest, being the total of the known damages sustained by libelant as aforesaid in the sum of $188,036.12, and such estimated amounts, the true figures being as yet unknown to libelant, as were expended for temporary repairs at Brisbane, and further necessary for the complete reequipment of the *Portmar*, with interest on such several items. No part of said sum has been paid to libel-
204 ant by respondents, although due demand has been made therefor.

THIRTY-FIFTH: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays that citation in due form of law according to the rules and practice of this Honorable Court may issue against respondents and each of them, citing them and each of them to appear and answer in the premises; that libelant may have decree against said respondents and each of them according to their several undertakings under said policies of war risk insurance, in the total sum of $902,761.12 with interest, as and for a

constructive total loss of SS. *Portmar* and sundry expenses incurred with respect to SS. *Portmar* as alleged in the First Cause of Action hereof, together with the costs of this action; or, in the alternative, if libelant be not entitled to recover as and for a constructive total loss, that libelant may have decree against said respondents and each of them according to their several undertakings under said policies of war risk insurance, in the total sum of $250,000 with interest, as and for a partial loss of SS. *Portmar* as alleged in the Second Cause of Action hereof, together with the costs of this action; and that libelant may have such other and further relief as may be just.

KIRLIN CAMPBELL HICKOX KEATING & MCGRANN,
Proctors for Libelant,
Office and P. O. Address,
120 Broadway,
Borough of Manhattan,
City of New York 5, N. Y.

(Verified by H. W. Warley, President of Calmar Steamship Corporation, November 10, 1944.)

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Schedule A.

(Opposite ☞)

Lloyd's Policy is here reproduced in its entirety with the exception of a list of the individual underwriters in each Lloyd's Syndicate and the proportion of the Syndicate amount underwritten by each.

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Definitive Numbers of Syndicates and Amount, Percentage or Proportion of the Total Amount assured shared between the Members of those Syndicates.

Amount, Percentage or Proportion.	Syndicate No.	Underwriters' Reference.	Amount, Percentage or Proportion.	Syndicate No.	Underwriters' Reference.	Amount, Percentage or Proportion.	Syndicate No.	Underwriters' Reference.
U.S Dollars			$ 2250	897	24/11	10000	232	24/11
$ 20000	422	26/11/41	15000	213	"	4000	112	"
10000	420	"	15000	690	"	4000	110	"
30000	108	"	20000	785	26/11	10000	368	"
24000	418	"	4000	263	24/11	10000	30	"
2400	419	"	3000	407	"	10000	382	"
3000	621	"	3000	450	"	10000	817	"
27000	17	"	1500	901	"	8400	700	"
3000	19	"	3000	999	"	4200	701	"
20000								
~~8000~~ 10000	412	"	3000	756	"	1200	702	"
~~1250~~	464		2500	451	"	1200	704	"
10500	334		3750	707	"	10000	855	"
9000	424	"	3750	121	"	15000	31	"
6000	95	"	15000	945	"	10000	435	"
4500	98	"	3000	948	"	10000	465	"
12500	632	"	2000	949	"	7500	483	"
12500	633	"	15000	28	"	7500	725	"
2000	631	"	10500	410	"	1500	636	"
25000	62	"	3000	366	"	3000	714	"
25000	185	" WR 99	1500	414	"	3000	320	28/11
14000	64	24/11	13500	764	"	8000	622	27/11
3000	488	"	15000	89	"	7500	590	"
2500	486	"	7500	455	"	1500	591	"
2500	500	"	7500	456	"	4000	654	"
11250	895	"	~~1500~~ 5000	50	"	5000	336	"
1500	441	"	15000	125	"	5000	304	"

~~1250~~ 464 " | 2500 451 " | 1200 704 "
10500 334 | 3750 707 " | 10000 855 "
9000 424 " | 3750 121 " | 15000 31 "
6000 95 " | 15000 945 " | 10000 435 "
4500 98 " | 3000 948 " | 10000 465 "

continued overleaf.

WAR RISK

568

LLOYD'S INCORPORATED BY ACT OF PARLIAMENT LONDON

London, 19th January 1942

"PORTMAR" /S/✓

U.S.PACIFIC to PHILIPPINES ETC
AND RETUR.

✓
U.S.$.714,000:-✓

Definitive Policy to be issued.

Amount.	Percentage of Premium.	Syndicate No.	Underwriters' Reference
$ 4000 ✓	2%	396 ✓	2/1/11
2000 ✓	1/2%	241 ✓	285
500 ✓	1%	965 ✓	882
4000 ✓	1%	811 ✓	2
6000 ✓	1%		162
1000 ✓	1%		474
1000 ✓	1%		398
2500 ✓	1%		395

Int. Passed as per Proposition of the Total Amount of Syndicates.

WAR RISK

568

LLOYD'S INCORPORATED BY ACT OF PARLIAMENT LONDON

FOR SIGNATURE BY UNDERWRITING MEMBERS OF LLOYD'S ACTS 1871 TO 1937

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person interested in the same if so subscribed, will be proceeded against under the Acts.

S.G.

J.S.$.714, 1942

Printed at Lloyd's, London.

"Warranted that the Ship is the property of the Owner (s) of the Ship or of a British subject (s) and that during the currency of this insurance the Ship shall not be sold or transferred to or chartered to the Government of any country other than the British Commonwealth of Nations or any of them.

This warranty shall not apply to any sale or transfer to or charter to the Government of any country other than the British Commonwealth of Nations or any of them which may be made (a) for the purpose of the Ship's trading between ports or places in the British Commonwealth of Nations or any of them or (b) for the purpose of the Ship's trading between ports or places in the British Commonwealth of Nations or any of them and ports or places in the United States of America or (c) for the purpose of the Ship's trading between ports or places in the United States of America or in the British Commonwealth of Nations or any of them and ports or places in any country other than the British Commonwealth of Nations or any of them."

U.S.PACIFIC to PHILIPPINES ETC
AND RETUR.

✓
U.S.$.714,000:-✓

TOUCHING the Adventures and Perils which we the Assurers are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises, and Ship, or any Part thereof; And in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no Acts of the Assurer or Assured in recovering, saving or preserving the Property insured shall be considered as a waiver or an acceptance of Abandonment. And it is agreed by us the Assurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves each one for his own Part, our Heirs, Executors and Goods, to the Assured, their Executors, Administrators and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured, after the Rate of

Warranted free from consequences of hostilities or warlike operations, whether before or after declaration of war, civil strife, arrests, restraints and detainments of all kinds.

And so in case of any Claim, we the Assurers bind ourselves each one for his own Part, our Heirs, Executors and Goods, to the Assured, their Executors, Administrators and Assigns. And for the Premium and Consideration aforesaid we agree to admit the Assurance to be made and Interest to be had, according to the Form of the Policy, at and after the Rate above mentioned.

IN WITNESS whereof we the Assurers have subscribed our Names and Sums assured in London.

as hereinafter mentioned. DECLARATION.

N.B.—Steel, Iron, Hemp, Flax, Timber and Deals are warranted free from Average unless general or the Ship be stranded.

NOTICE. Each Policy attached to this Slip is subscribed by the Assurers thereon alone and not one another, and/or Declaration, and the Assurers are only liable for the due proportion of their respective Subscriptions of the total Sum insured by such Assurers.

IN WITNESS whereof I the undersigned have subscribed my name and seal on behalf of the Assurers.

DGF/JP ✓

(In the

(12-11-39) 24-12-40

D41/11356 ✓

661/3 LR

10142 * 12 FEB 1942

568

No Policy or other Contract dated on or after 1st Jan., 1924, will be recognised by the Committee of Lloyd's as entitling the holder to the benefit of the Funds and/or Guarantees lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office.

Be it known that CALMAR STEAMSHIP CORPORAT

as well in *their* own Name, as for and in the Name and Names of all and every [illegible] Person [illegible] nce, an[illegible] Persons to whom the same doth, may, or shall appertain, in part or in all, doth mak[illegible] cause *themselves* and them and every of them, to be insured, lost or not lost, at a[illegible]

A UNITED STATES PACIFIC port to port or port[illegible] PHILIPPINES ISLANDS, whilst there and return [illegible] STATES PACIFIC port or UNITED STATES ATLANTIC port[illegible]

upon any kind of Goods and Merchandises, and also the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the +(Via Panama Ca[illegible] Via "PORTMAR" /S/ (Warranted sailing port or ports [illegible] as per slip) and for 24 h[illegible]s a[illegible] arrival.

whereof is Master, under God, for this present Voyage, [illegible] Ship o[illegible] er or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names [illegible] fro[illegible] ng thereof, is or shall be named or called, beginning the Adventure upon the said Goods and Mer[illegible] upon th[illegible] *above* thereof aboard the said Ship *as above*

and shall so continue and endure during her Ab[illegible] e said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goo[illegible] handises upon the said Ship, &c., whatsoever, shall be arrived at *as above*

until she hath moored at anchor ~~Twenty-four Hours~~ in good Safety, and upon the Goods and Merchandises [illegible] the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage [illegible] all to and touch and stay at any Ports or Places whatsoever *and wheresoever for all purposes* without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for a[illegible] Assured by Agreement between the Assured and Assurers in this Policy, are and shall be val[illegible]

On HULL & MACHINERY Valued at [illegible]000 Amount insured hereunder - Seve[illegible] and Fourteen Thousand United Sta[illegible]rs

Only against the risks of war, s[illegible] riots and civil commotions as [illegible] Form attached.

"Warranted that throughout the full period named in this policy the Owner (s) of the vessel (s) hereby insured is (are) in possession of a British Government 'Ship warrant,' or that a certificate permitting insurance has been issued by the British Ministry of Shipping in respect of such vessel s, or that the vessel s) be chartered to the British Ministry of Shipping or to a national of the British Commonwealth of Nations (excluding E[illegible]

This warranty does not apply to the insured vessel(s) if (a) under 200 gross tons

or (b) of British (excluding Eire) Allied (the [illegible] Belgian, Dutch Greek Norwegian or Polish United States of America or Swedish Registration.

or (c) trading exclusively on the rivers or inland waters or customarily employed within the limits of a port of North Central or South America, or on the Yangtsze River."

TOUCHING the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandises and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

Warranted free of capture seizure arrest restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not, civil war, revolution rebellion insurrection or civil strife arising therefrom, or piracy.

And so we, the Assurers, are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of $1.50 percent. ✓

19th January, 1942.

IN WITNESS whereof we, the Assurers, have subscribed our Names and Sums assured in *LONDON*, No. D41/11356 ✓ as hereinafter appears.

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded.

NOW KNOW YE, that We the Assurers members of the Syndicates whose definitive Numbers in the attached list are set out in the Table overleaf, hereby bind Ourselves, each for his own part and not for one another, and in respect of his due proportion only, to pay or make good to the Assured all such Loss and/or Damage which he or they may sustain by any one or more of the aforesaid perils, and so that the due proportion for which each of Us the Assurers is liable shall be ascertained by reference to his proportion as ascertained according to the said List of the Amount, Percentage, or Proportion of the total Sum assured which is in the said Table set opposite the definitive Number of the Syndicate of which such Assurer is a member.

IN WITNESS whereof the Manager of Lloyd's Policy Signing Office has subscribed his Name on behalf of each of Us.

LLOYD'S POLICY SIGNING OFFICE.

MANAGER.

DGF/JP.

(In the event of accident whereby loss or damage may result in a claim under this Policy, the settlement will be much facilitated if immediate notice be given to the nearest Lloyd's Agent.)

(18-11-39) 24-12-40 M25

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

S.G.

J.S.$ 714,000:-

Printed at Lloyd's, London, England.

This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked out workmen, or persons taking part in labor disturbances or riots or civil commotions and destruction of or damage to the property directly caused by persons acting maliciously.

MD2

WAR RISK CLAUSES

It is agreed that this insurance covers only those risks which would be vered by the attached policy (including the Collision Clause) in the absence of the C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:-

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and without deduction of new for old. The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel.

Warranted free of any claim for delay or demurrage and warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured. Also warranted not to abandon in case of blockade and free from any claims for loss or expense in consequence of blockade or of any attempt to evade blockade; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes, or peoples.

The premium paid for this insurance shall not be subject to any return for layups or otherwise.

The "Breach of Warranty" clause in the printed policy is deleted and the following clause substituted therefor:-

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required".

F-300

Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.

B.C.2

Note

Page 71 is blank.

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Answer, Dated July 16, 1947.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Adm. 133-332.

The answer of Sydney Keith Scott, The Edinburgh Assurance Co., Ltd., Northern Maritime Insurance Co., Ltd.,
215 Fine Art & General Insurance Co., Ltd., The British Law Insurance Co., Ltd., Planet Assurance Co., Ltd., Elders Insurance Co., Ltd., National Provincial Insurance Co., Ltd., and Excess Insurance Company Limited, to the libel and complaint of Calmar Steamship Corporation, in an alleged cause of Contract and War Risk Insurance, civil and maritime, alleges upon information and belief, as follows:

FIRST: Respondents admit the allegations in Article First of the libel.

216 SECOND: Respondents admit the allegations in Article Second of the libel, except that they deny knowledge or information sufficient to form a belief as to the operation of the SS. *"Portmar"* by the libelant subsequent to January 19, 1942.

THIRD: Respondents admit and allege that libelant represented to respondents that the *"Portmar"* was to be employed as a merchant vessel for trading for one round voyage from a United States Pacific port to port or ports in the Philippine Islands and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order; and, on information and belief, admit that the SS. *"Portmar"* was chartered as alleged in Article Third of the libel.

Answer, Dated July 16, 1947. 217

FOURTH: Respondents admit the allegations in Article Fourth of the libel.

FIFTH: Respondents admit the allegations in Article Fifth of the libel.

SIXTH: Respondents admit the allegations in Article Sixth of the libel.

SEVENTH: Respondents admit that each of the said policies contains, among other clauses, the clauses quoted in Article Seventh of the libel. 218

EIGHTH: Respondents admit and allege on information and belief that on November 28, 1941, the *"Portmar"* sailed from San Francisco with a cargo bound for Manila, Philippine Islands, and followed that voyage until December 11, 1941, when she was ordered by the Commandant of the Twelfth United States Naval District to put into Suva, Fiji Islands. The Master of the *"Portmar"* obeyed said orders and proceeded to Suva, whence she proceeded to Sydney, Australia, and arrived at Sydney on December 30, 1941, and was ordered to proceed to Brisbane and there discharge part of her cargo; that in compliance with said 219 order the *"Portmar"* proceeded to and arrived at Brisbane on January 5, 1942, and there discharged a portion of her cargo designated by the Australian Naval Control Officer at that port; that said officer then ordered the *"Portmar"* to proceed to Port Darwin with the remainder of the cargo, which order was obeyed and the *"Portmar"* arrived at Port Darwin on January 19th; that the master reported to the Australian Naval Control Officer, who ordered the *"Portmar"* to discharge the remainder of the cargo; and pursuant to said order the *"Portmar"* discharged the remainder of her cargo, except 1,500 drums of gasoline which her master was ordered by the Australian Naval

CALMAR STEAMSHIP CORPORATION

FOR ACCOUNT OF THEMSELVES

but subject to the provisions of this Policy with respect to change of ownership.

Should the Vessel be sold or transferred to other ownership or chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled from date of such sale, transfer, charter or requisition; provided, however, that in the case of an involuntary transfer by requisition or otherwise, without the prior execution of any written agreement by the Assured, such cancellation shall take place fifteen days after such transfer; and provided further that if the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, such cancellation shall be suspended until arrival at final port of discharge if with cargo or at port of destination if in ballast. This insurance shall not inure to the benefit of any such charterer or transferee of the Vessel, and if a loss payable hereunder should occur during such period of fifteen days the Underwriters shall be subrogated to all the rights of the Assured against the transferee, by reason of such transfer, in respect to all or part of such loss as is recoverable from the transferee and in the proportion which the respective amounts insured bear to the insured value. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of sale, transfer, charter or requisition shall apply even in the case of insurance "for account of whom it may concern".

Loss, if any, payable to them, or order.

In the sum of Seven Hundred and Fourteen Thousand United States Dollars ✓ Dollars.

At and from the as below day of

To the as below day of } beginning and ending with time.

Provided, however, should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

On the Steamer called the "PORTMAR" (United States Flag)

(or by whatsoever name or names the said Vessel is or shall be called).

The said Vessel, for so much as concerns the Assured, by agreement between the Assured and Underwriters in this Policy, is and shall be valued at as follows:

Hull, tackle, apparel, passenger fittings, equipment, stores, ordnance, munitions, boats and other furniture . . . . . $ } $ 860,000.

Boilers, machinery, refrigerating machinery and insulation, and everything connected therewith $

Donkey boilers, winches, cranes, windlasses, steering gear and electric light apparatus shall be deemed to be a part of the hull and not of the machinery.

The Underwriters to be paid in consideration of this insurance Dollars

being at the rate of 1-1/2 per cent.

In event of non-payment of premium thirty days after attachment this Policy may be cancelled by the Underwriters upon five days written notice being given the Assured.

To return ___ cents per cent. net for each uncommenced month if it be mutually agreed to cancel this Policy.
As follows for each consecutive 30 days the Vessel may be laid up in port, viz.:—
___ cents per cent. net under repair or outside the United States;
___ cents per cent. net in the United States with cargo on board and not under repair;
___ cents per cent. net in the United States not under repair, and with no cargo on board excepting while actually loading or discharging.
Provided always: (a) that in no case shall a return be allowed when the within named Vessel is lying in a roadstead or in exposed and unprotected waters.
(b) that in the event of a return for special trade, or any other reason, being recoverable, the above rates of return of premium shall be reduced accordingly.
} and arrival.

In the event of the Vessel being laid up in port for a period of 30 consecutive days, a part only of which attaches to this Policy, it is hereby agreed that the laying up period, in which either the commencing or ending date of this Policy falls, shall be deemed to run from the first day on which the Vessel is laid up and that on this basis Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of days attaching thereto bear to thirty.

BEGINNING THE ADVENTURE upon the said Vessel, as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port and at sea, in docks and graving-docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam, motor power or sail; with leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but if without the approval of Underwriters the Vessel be towed, except as is customary or when in need of assistance, or undertakes towage or salvage services under a pre-arranged contract made by Owners and/or Charterers, the Assured shall pay an additional premium if required by the Underwriters but no such premium shall be required for customary towage by the Vessel in connection with loading and discharging. With liberty to discharge, exchange and take on board goods, specie, passengers and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise. Including all risks of docking, undocking, changing docks, or moving in harbor and going on or off gridiron or graving dock as often as may be done during the currency of this Policy.

But Warranted as follows: This policy covers only War Risks, Strikes, Riots, etc. as per attached clauses.

At and from a United States Pacific port to port or ports in the Phillipine Islands, whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any ~~route~~ order and for 24 hours after arrival.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire. The Underwriters shall be entitled to decide the port to which a damaged Vessel shall proceed for docking or repairing (the actual additional expense of the voyage arising from compliance with Underwriters' requirements being refunded to the Assured) and Underwriters shall also have a right of veto in connection with the place of repair or repairing firm proposed and whenever the extent of the damage is ascertainable the majority (in amount) of the Underwriters may take or may require to be taken tenders for the repair of such damage. In cases where a tender is accepted with the approval of Underwriters, an allowance shall be made at the rate of 30 per cent. per annum on the insured value for each day or part thereof from the time of the completion of the survey until the acceptance of the tender provided that it be accepted without delay after receipt of Underwriters' approval. No allowance shall be made for any time during which the Vessel is loading or discharging cargo or bunkering or taking in fuel. Due credit shall be given against the allowance as above for any amount recovered:—

(a) in respect of fuel and stores and wages and maintenance of the Master, Officers and Crew or any member thereof allowed in General or Particular Average;

(b) from third parties in respect of damages for detention and/or loss of profit and/or running expenses;

for the period covered by the tender allowance or any part thereof.

In the event of failure to comply with the conditions of this clause 15 per cent. shall be deducted from the amount of the ascertained claim.

Warranted that the amount insured for account of the Assured and/or their managers on Disbursements, Commissions and/or similar interests, "policy proof of interest" or "full interest admitted" or on excess or increased value of Hull or Machinery, however described, shall not, except as indicated below, exceed 10 per cent. of the insured valuation of the Vessel, but the Assured may in addition thereto effect "policy proof of interest" or "full interest admitted" insurance on any of the following interests:

(a) Premiums. Any amount not in excess of actual premiums for twelve months on all interests of whatsoever nature insured (including estimated premium on any Protection and Indemnity Insurance), but in all cases reducing monthly by a proportionate amount of the whole, and

(b) Freight and/or Chartered Freight and/or Anticipated Freight and/or Earnings and/or Hire or Profits on Time Charter and/or Charter for series of voyages for any amount not exceeding in the aggregate 15 per cent. of the insured valuation of the Vessel; and if the actual amount at risk on any or all of such interests shall exceed such 15 per cent. of the insured valuation of the Vessel, the Assured and/or their managers may, without prejudice to this warranty, insure whilst at risk the excess of such interests reducing as earned, and

(c) Risks excluded by the "F. C. & S. Clause", and

(d) Loss or damage in consequence of strikes, lockouts, political or labor disturbances, civil commotions, riots, martial law, military or usurped power or malicious act.

Provided always that a breach of this warranty shall not afford the Underwriters any defense to a claim by mortgagees or other third parties who may have accepted this Policy without notice of such breach of warranty nor shall it restrict the right of the Assured and/or their managers to insure in addition General Average and/or Salvage Disbursements whilst at risk.

(CONTINUED)

F. C. & S. CLAUSE

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This insurance also specially to cover (subject to the Average Warranty) loss of or damage to hull or machinery directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel;

Explosions on shipboard or elsewhere;

Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part);

Contact with Aircraft;

Negligence of Master, Charterers, Mariners, Engineers or Pilots;

Provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

And it is further agreed that in the event of salvage, towage or other assistance being rendered to the Vessel hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership or control of the Vessels) shall be ascertained by arbitration in the manner below provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provision, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

When the contributory value of the Vessel is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the Vessel) or Salvage shall not exceed that proportion of the total contribution due from the Vessel that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the Vessel has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

In the event of expenditure for Salvage, Salvage Charges or under the Sue and Labor Clause, this Policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the Underwriters are liable, bears to the value of the salved property. Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this Policy without any deduction for loss and/or damage shall bear its pro rata share of such expenses or excess of expenses accordingly.

Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to $4,850, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above a line drawn from the North Basin, Buenos Aires, to the mouth of the San Pedro River) or its tributaries, or in the Danube or Demerara Rivers or on the Yenikale Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the Average be Particular or General.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

The warranty and conditions as to Average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the Vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, Particular Average occurring outside the period covered by this Policy may be added to Particular Average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the term covered by this Policy.

And it is further agreed that if the Vessel hereby insured shall come into collision with any other Ship or Vessel and the Assured or the Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Vessel hereby insured, provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, we will also pay a like proportion of the costs which the Assured or Charterers shall thereby incur, or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners or Charterers of one or both of such Vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of Cross-Liabilities as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and amount of liability as between the two Vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Hull Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding. Provided always that this clause shall in no case extend to any sum which the Assured or Charterers may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim being made by Charterers under this clause they shall not be entitled to recover in respect of any liability to which the Owners of the Vessel, if interested in this Policy at the time of the collision in question, would not be subject, nor to a greater extent than the Shipowners would be entitled in such event to recover.

SERVICE OF SUIT CLAUSE (U. S. A.).—It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction, and service of process in such suit may be made upon Messrs. Duncan & Mount, New York, N. Y., and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal. Messrs. Duncan & Mount, New York, N. Y., are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the Assured's request to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

The terms and conditions of this form are to be regarded as substituted for those of Policy form to which it is attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy.

Attached to Policy No. D11/11356. of the Lloyds. London.

American Institute TIME (HULLS) (July 1, 1941) F

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Control Officer to retain on board. Respondents deny that they or any of them have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Eighth of the libel.

NINTH: Respondents admit that on or about January 26, 1942, libelant through its London brokers, Thos. Stephens & Sons, Ltd., notified respondents that the S/S *Portmar* had been diverted to Australia on her outward voyage under Government orders, and requested that the vessel be held covered pending further advices; and that
221 the respondents agreed that the vessel be held covered to Australia. Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of each and every other allegation in Article Ninth of the libel.

TENTH: On information and belief, respondents admit the allegations in Article Tenth of the libel.

ELEVENTH: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Eleventh of the libel.

TWELFTH: Respondents deny that the master devoted any part of his time and attention to any matters affecting
222 respondents' interests, deny that the master devoted all or any appreciable part of his time and attention to matters affecting the interests of the vessel subsequent to February 21, 1942, and deny that they have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Twelfth of the libel.

THIRTEENTH: Respondents admit that the S/S *Portmar* was floated on or about April 5, 1942, under the direction of Captain John Protheroe Williams, Managing Director of United Salvage Proprietary Limited, who was also appointed Chief Salvage Officer of the Commonwealth Salvage Board of the Australian Government; and deny any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Thirteenth of the libel.

223

FOURTEENTH: Respondents admit that the *Portmar* was lying safely afloat in the Harbor of Port Darwin on April 8, 1942, although somewhat damaged by enemy bombing attacks, and deny any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Fourteenth of the libel.

FIFTEENTH: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Fifteenth of the libel.

SIXTEENTH: Respondents admit that on the 8th day of April, 1942, libelant, through its London Brokers, Thos. Stephens & Sons, Ltd., gave an attempted notice of abandonment to respondents, and that respondents declined to accept said attempted notice of abandonment, but agreed that libelant would be held to be in the same position as if writs had issued on April 8, 1942, in connection therewith; and respondents deny each and every other allegation in Article Sixteenth of the libel.

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SEVENTEENTH: Respondents admit that on the facts disclosed to them by libelant, they denied liability on several grounds including those set forth in Article Seventeenth of the libel.

225

EIGHTEENTH: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Eighteenth of the libel.

NINETEENTH: Respondents admit that the libelant paid and the respondents severally accepted the amount of premium stipulated in each of the said policies for the voyage stipulated therein, and deny each and every other allegation in Article Nineteenth of the libel.

TWENTIETH: Respondents admit demand and non-payment, and deny each and every other allegation in Article Twentieth of the libel.

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Answering the Libelant's Second Cause of Action:

TWENTY-FIRST: Respondents here repeat all the admissions and denials above set forth as to the matters alleged in Articles First to Fourteenth, inclusive, of the libel.

TWENTY-SECOND: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Twenty-second of the libel.

227 TWENTY-THIRD: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Twenty-third of the libel.

TWENTY-FOURTH: Respondents admit that they agreed without prejudice to the rights or liabilities of any party under the policies herein sued on, that libelant defend an action in Australia for excessive salvage demands against the *"Portmar"*, and deny that they have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Twenty-fourth of the libel.

228 TWENTY-FIFTH: On information and belief, respondents admit that the *"Portmar"* proceeded from Brisbane to Sydney under her own steam. Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Twenty-fifth of the libel.

TWENTY-SIXTH: Respondents admit that on or about November 19, 1942, they appointed a surveyor to join in a joint survey of the *"Portmar"* at Sydney to estimate the cost of repairs, without prejudice to respondents' position; and respondents deny each and every other allegation in Article Twenty-sixth of the libel.

TWENTY-SEVENTH: Respondents admit that on a joint survey of the S/S *"Portmar"* held at Sydney, N. S. W.,

Australia, afloat and in drydock, it was agreed that the cost of all damage repairs necessary to restore the *"Portmar"* to the condition she was in prior to being bombed in the Timor Sea and at Port Darwin in February, 1942, would amount to £28,000 Australian; and deny that they have any knowledge or information sufficient to form a belief as to the truth of each and every other allegation in Article Twenty-seventh of the libel. 229

TWENTY-EIGHTH: Respondents admit that on the facts disclosed to them by libelant, they denied liability on several grounds, including those set forth in Article Seventeenth and realleged in Article Twenty-eighth of the libel. 230

TWENTY-NINTH: Respondents admit that on or about February 13, 1943, United Salvage Proprietary Limited and John Protheroe Williams instituted suit *in rem* against the *"Portmar"* in the High Court of Australia in Admiralty, Docket No. 24, claiming a salvage award of £50,000 Australian, by reason of salvage services rendered to the *"Portmar"* following enemy attacks; that thereafter said Commonwealth Salvage Board brought suit against Calmar Steamship Corporation *in personam* in the same Court, Docket No. 25, to enforce its claim for salvage award for services rendered the *"Portmar"* after said enemy attacks. 231 That libelant defended said salvage actions and caused the testimony of witnesses to be taken; and that on November 19, 1943, said Court rendered judgment in said salvage proceedings allowing said United Salvage Proprietary Limited and said John Protheroe Williams a salvage award in the sum of £5,000 Australian with costs, but dismissing the claim of said Commonwealth Salvage Board with costs. Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Twenty-ninth of the libel.

THIRTIETH: Respondents admit that the aforesaid policies each contained the words quoted in Article Thir-

232 *Answer, Dated July 16, 1947.*

tieth of the libel; and deny each and every other allegation in Article Thirtieth of the libel.

THIRTY-FIRST: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Thirty-first of the libel.

THIRTY-SECOND: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Thirty-second of the libel.

233 THIRTY-THIRD: Respondents admit that the libelant paid and the respondents severally accepted the amount of premium stipulated in each of the said policies for the voyage stipulated therein, and deny each and every other allegation in Article Thirty-third of the libel.

THIRTY-FOURTH: Respondents admit demand and non-payment, and deny each and every other allegation of Article Thirty-fourth of the libel. The respondents specifically deny that the S/S *"Portmar"*, at the time she suffered the damages referred to in the libel, was covered by the policies sued on herein.

234 THIRTY-FIFTH: Respondents admit the Admiralty and Maritime jurisdiction of the United States and of this honorable Court, and deny each and every other allegation in Article Thirty-fifth of the libel.

Further Answering Said Libel and for a First, Separate and Complete Defense Thereto, Respondents Allege, Upon Information and Belief:

THIRTY-SIXTH: Respondents subscribed and issued the several insurance policies hereinabove referred to, wherein and whereby they, severally for specified amounts and not jointly, insured the libelant against risks therein specified

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for a voyage of the S/S "*Portmar*" at and from a United States Pacific Port to port or ports in the Philippine Islands, whilst there, and return to United States Pacific Port or United States Atlantic Port (via Panama Canal), via port or ports, any order and for twenty-four hours after arrival.

THIRTY-SEVENTH: On or about November 28, 1941, the "*Portmar*" sailed on the said voyage from San Francisco bound for Manila, Philippine Islands and followed the said voyage until on or about December 11, 1941, when she changed the said voyage and proceeded to Suva, Fiji 236
Islands, whence she sailed on or about December 22, 1941, and arrived at Sydney, Australia, on or about December 30, 1941; whence she sailed to Brisbane, Australia, arriving there about January 5, 1942, whence she sailed for Port Darwin, Australia, and arrived there in good safety on or about January 19, 1942, and there remained in good safety for more than twenty-four hours and discharged almost all of her cargo and had full opportunity to discharge all of her cargo; and thereupon the said voyage was broken up, terminated and abandoned, and the said policies and each of them by their terms and intent expired and terminated.

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Further Answering Said Libel and for a Second, Separate and Complete Defense Thereto, Respondents Allege, Upon Information and Belief:

THIRTY-EIGHTH: Respondents repeat and reallege each and all the matters alleged in Articles Thirty-sixth and Thirty-seventh hereof with the same force and effect as if here fully set forth.

THIRTY-NINTH: If it should be held that said voyage was not broken up, terminated and abandoned twenty-four hours after the "*Portmar's*" arrival in good safety at Port Darwin and unloading or being free to unload all of her

cargo, and that said policies and each of them by the terms and intent did not thereupon expire and terminate; the *"Portmar"* thereafter sailed from Port Darwin February 4, 1942, and arrived at Wyndham, Western Australia, February 8, 1942, where she remained in good safety for more than twenty-four hours and there discharged all of her cargo, including additional cargo loaded at Port Darwin; and the libelant thereupon, or previous thereto, gave up all intention of proceeding with the insured voyage either then or at any other time, and the said voyage was thereupon (if not previously) broken up, terminated and abandoned, and the said policies and each of them by their terms and intent, expired and terminated; and the *"Portmar"* thereupon entered upon new voyages and adventures not within the provisions of the said policies, and not within the coverage intended thereby, and neither subordinate to nor connected with the insured voyage; and respondents and each of them were thereby discharged with respect to any and all loss and damage to the *"Portmar"* thereafter caused or incurred.

Further Answering Said Libel and for a Third, Separate and Complete Defense Thereto, Respondents Allege, On Information and Belief:

FORTIETH: Respondents repeat and reallege each and all the matters alleged in Articles Thirty-sixth, Thirty-seventh and Thirty-ninth hereof, with the same force and effect as if here fully set forth.

FORTY-FIRST: The libelant represented to the respondents and the respondents subscribed and issued the policies hereinabove referred to upon the express representation and understanding, that the *"Portmar"* was a merchant vessel and would be engaged as such on the insured voyage, and that the insurance so effected was to cover only a vessel

used in trading and not as a public vessel engaged in warlike operations.

FORTY-SECOND: On or prior to February 13, 1942, without the consent or knowledge of respondents, the status of the "*Portmar*" was changed from a merchant vessel trading under the libelant's management and control to a war ship engaged in warlike operations and operating as a troop transport; and thereafter the "*Portmar*" was intentionally exposed to enemy attack in an active war area, and sustained the damages referred to in the libel in such enemy attack. Even if said policies be held not to have 242
previously expired and terminated, the foregoing facts were in violation of libelant's said representations and the intent and understanding of the parties hereto, and the said policies therefore did not cover or insure the said vessel after she ceased to be employed in commercial trade, and after she was employed as a troop transport; and respondents are, therefore, not liable for any damage or loss arising under said conditions.

Further Answering Said Libel and for a Fourth, Separate and Complete Defense Thereto, Respondents Allege, Upon Information and Belief: 243

FORTY-THIRD: Respondents repeat and reallege each and all the matters alleged in Articles Thirty-sixth, Thirty-seventh, Thirty-ninth and Forty-first and Forty-second hereof with the same force and effect as if here fully set forth.

FORTY-FOURTH: Respondents are not liable under the terms and intent of the policies hereinabove referred to, and libelant is not entitled to recover thereunder from respondents, for any alleged loss, damage or expense which was occasioned by or resulted from the intentional exposure of said vessel to enemy attack in an active war area.

244 *Answer, Dated July 16, 1947.*

Further Answering the Libel and as a Defense and Set-off Thereto, Respondents Allege, on Information and Belief:

FORTY-FIFTH: Each of the aforesaid policies provides:

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these insurers when such facts are known to the assured and/or their managers and an additional premium
245 paid if required."

FORTY-SIXTH: If it should be held (contrary to the respondents' contention) that said voyage of the *"Portmar"* was not broken up, terminated and abandoned on or prior to the 13th day of February, 1942, and the said policies of insurance thereupon and thereby terminated; the voyage of said vessel as represented by the libelant and as agreed by the parties was changed to a voyage from Port Darwin to Koepang on the Island of Timor at a time when it was known the Japanese armed forces were attacking the Island of Timor and particularly the port of
246 Koepang with bombs and gunfire, and that the Harbor of Koepang was so dangerous that the United States battleships and other ships of war refused to enter the said harbor. By reason of the foregoing, if it be held that there was merely a deviation or change of voyage and that the policies aforesaid still covered the *"Portmar"*, the respondents are entitled to receive an additional premium for such deviation or change of voyage.

FORTY-SEVENTH: The fair and reasonable additional premium for such deviation or change of voyage is 100% of the value of the vessel as agreed in the said policies of insurance, viz. $860,000.

Answer; Dated July 16, 1947. 247

Further Answering the Alleged First Cause of Action in said Libel, and for a Separate Complete Defense Thereto, Respondents Allege on Information and Belief:

FORTY-EIGHTH: The insurance policies on which this suit is brought provide:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the insured value." 248
>
> "In ascertaining whether the vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account."
>
> • • • • • •
>
> "The provisions of the attached policy with respect to a constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

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At the time of the attempted notice of abandonment, on or about April 8, 1942, referred to in Article Sixteenth of the libel, the *"Portmar"* was safely afloat and the expense of recovering and repairing the *"Portmar"* plus all other expenses of the libelant are estimated by the libelant in Article Thirty-Fourth of the libel as $250,000, which amount is considerably less than one-third of her insured value ($860,000). By reason of the foregoing, even if the said policies were in force and effect after February 13, 1942 (which respondents deny), libelant was not entitled to declare the *"Portmar"* a constructive total loss, and the libelant's attempted abandonment of the vessel to the respondents on or about April 8, 1942, was void and of no effect. In view of the explicit policy provision above

250 *Answer, Dated July 16, 1947.*

quoted, the argument as to "high probability" incorporated in Article Sixteenth of the libel has no application.

Further Answering the Alleged First Cause of Action in Said Libel and as a Defense and Set-off Thereto, Respondents Allege, on Information and Belief:

FORTY-NINTH: If it should be held (contrary to the respondents contention) that the said policies of insurance
251 were in full force and effect on April 8, 1942, and that the attempted abandonment on that date was valid and effective, respondents are entitled to receive all charter hire and other earnings of said vessel arising and/or accruing on and after February 19, 1942 (the date of the Japanese air attack at Port Darwin) as well as the value of said vessel as requisitioned by the United States of America, War Shipping Administration and Maritime Commission, which said earnings and compensation for requisition the libelant has, on information and belief, failed and neglected to demand and collect. Respondents do not know at this time the amounts of the foregoing.

252 FIFTIETH: All and singular the premises are true.

WHEREFORE, respondents pray that the libel herein be dismissed with costs, or, if any sums are found due the libelant, that the same may be reduced by the amounts due respondents under the aforesaid set-offs, and that the respondents may have such other and further relief as may be just and proper.

MENDES & MOUNT,
Proctors for Respondents,
Office & P. O. Address,
27 William Street,
Borough of Manhattan,
New York 5, N. Y.

(Verified by Russell T. Mount, July 16, 1947.)

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Testimony.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware corporation,
Libelant,
vs.
UNITED STATES OF AMERICA,
Respondent.

A. 129-295.

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CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
vs.
SYDNEY KEITH SCOTT, one of the Lloyds Underwriters, EDINBURGH ASSURANCE COMPANY, LTD., *et al.*,
Respondents.

A. 133-332.

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Before:

HON. SYLVESTER J. RYAN,
District Judge.

New York, January 18, 1951;
10.30 a. m.

Appearances:

KIRLIN, CAMPBELL, HICKOX & KEATING, Esqs., Proctors for Libelant; EDWIN S. MURPHY, Esq., IRA A. CAMPBELL, Esq., and HELEN C. CUNNINGHAM, Esq., of Counsel.

256 *Opening Statement.*

IRVING H. SAYPOL, Esq., United States Attorney, Proctor for Respondents in A. 129-295; By EDWARD L. SMITH, Esq., Attorney, Department of Justice.

MENDES & MOUNT, Esqs., Proctors for Respondents in A. 133-332; R. T. MOUNT, Esq., and W. B. HALL, Esq., of counsel.

The Court: Gentlemen, we call for trial two suits in
257 admiralty, Calmar Steamship Company, Libelant, *vs.* Sydney Keith Scott, *et al.*, respondents, Admiralty 133-332; and Calmar Steamship Corporation, libelant, *vs.* United States of America, respondent, Admiralty 129-295.

I understand that it is agreeable that both these suits shall be tried simultaneously and that the Court may consider the evidence presented as evidence in both these suits.

Mr. Murphy: That is consented to.

Mr. Smith: That is agreed.

Mr. Mount: That is right.

The Court: We should fix the order in which we will proceed with reference to the presentation of proof and with reference to examination of witnesses.

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(Discussion off the record.)

The Court: This will be the tentative order of presentation of proof and examination of witnesses, and this order will be subject to change as we proceed, we will hear the libelant, then the United States of America and then the underwriters.

Mr. Mount: I think that is logical.

Mr. Smith: Yes.

The Court: I think we should have a brief opening statement on the record from each of the parties.

I will hear Mr. Murphy first, and take your time.

Mr. Murphy: May it please the Court, this is an action by the shipowner, the owner of the SS. *Portmar*, against

the war risk underwriters of this vessel for damages sustained by enemy attack on that vessel in the harbor at Port Darwin, Australia, and at sea just preceding the attack in the harbor in February 1942.

I stress the basic fact that it is an action against the war risk underwriters because the damage sustained by the vessel was unquestionably caused by the consequences of hostilities and warlike operations which are insured against in the policies.

The form of the insurance involved in this case is the American Marine Institute Hull 1941 form and is substantially in the same form that was involved in the case of the *John Worthington*, YMS 12, which your Honor decided two years ago. The insurance, your Honor will find, is a basic marine policy with an f. c. & s. clause printed in it which excludes from the marine policy all consequences of hostilities and warlike operations, and there is then attached to the marine policy a war risk endorsement under which the war risk underwriters take upon themselves all risks excluded from the basic marine policy by the f. c. & s. clause. 260

In this case, however, there is an additional provision in the form of a rider which is attached to the war risk endorsement, and that rider specifically provided for and contemplated the very events which happened in this case. 261

The claim of Calmar Steamship Corporation is, therefore, against these war risk underwriters, first and foremost, for a constructive total loss of the steamship *Portmar* by reason of damages she sustained in the Timor Sea and at Port Darwin between February 16th and February 19, 1942.

If the Court finds that a constructive total loss did not occur, despite our contentions, then the claim of Calmar Steamship Corporation is against these war risk underwriters for the actual losses sustained as a partial loss under the same policies.

requisitioned—if Calmar Steamship Corporation was the owner at the time of requisition.

Many of the items which are claimed as a partial loss have not yet been incurred by actual payment of money by Calmar Steamship Corporation. Some of them have and some of them have not. Those which have not have been legally sustained because Calmar was the owner at the time the ship was damaged and thus the underwriters are liable for a partial loss whether the repairs are made or not because the ship has been damaged to that extent. But I wish to point out to the Court that Calmar will sustain
293 those actual money damages in a payment sense when the United States effects a reduction of what the sound value of the Portmar would have been on the date of requisition and deducts from that theoretically sound value the amount of damage which the vessel had sustained and will pay Calmar only the damaged value of the vessel. In that sense Calmar will sustain the actual money damages.

I make that statement in order to make clear that Calmar hasn't yet paid, for example, the cost of the towage. That was paid by the Army. It hasn't paid anything with respect to repairs. That was paid by the United States either through the Army or the War Shipping Administra-
294 tion. It has paid the salvage award which was ultimately determined. True, it came out to a fairly small amount but no one knew that it would.

It has incurred certain sue and labor expenses. That is an expression taken from the marine policy, which provides that in the event of loss the assured shall sue and labor for the benefit of the underwriters. It simply means he must do all he can and incur every reasonable expense to protect the property and minimize the underwriter's loss, and, if he does so, the underwriters will pay whatever expenditure he makes for their benefit in that respect.

So the Calmar Steamship Corporation claims against the war risk underwriters for a partial loss and, first and foremost and throughout this case, Calmar's position is that

these war risk underwriters were on this risk throughout and should not be allowed to evade their just liability under their own contract, for which they were paid their required premium.

The Court: Now, Mr. Smith.

Mr. Smith: If the Court pleases, I think at the outset the United States ought to make it very clear as to the exact capacity in which it is involved in these proceedings. We were basically a shipper of Army supplies and materiel.

This ship had not been demised to the United States. We did not take the ship over and run it as a Government vessel. We merely made a contract of affreightment to 296
carry supplies to the United States armed forces in the Philippines, in the form of the voyage charter for a round trip from West Coast ports to the Philippines.

The charter party was actually put upon a so-called time charter form of charter, but it was basically a voyage charter.

We take the position that the charter party contemplated that the owner would operate the ship, that the owner would take all of the operator's risk of this ship, and that he would insure himself against all of the risks which an owner, a prudent owner at that time would insure himself against, 297
and that he would add the cost of that kind of insurance to what he was to get under the charter party, but the United States did not insure the vessel. We were not insurers. We were shippers.

To interpret the agreement which the United States made, you have to consider the situation in which the parties found themselves. The United States was acting as the Arsenal of Democracy. The Lend-Lease Act had been in force for a good long time. The *Robin Moore* had been sunk by German submarines many months before. The Congress on November 17th, before the date of this charter, had authorized the President to arm privately-owned American merchant ships, and they were being armed. Last-minute negotiations were in progress in Washington with the Japanese in a last effort to stave off war.

298

Under those circumstances, this ship was sailing at a time when war was imminent, when everybody knew that war was imminent, and the question of who was going to be responsible for the war risks was a matter which everybody made very certain of before they entered into a shipping contract.

This contract provided that the owner might insure against war risk and, if he did do that and submitted his insurance to the Government, that the Government would pay the premium or, in the alternative, the Government might elect to insure. But in this case the owner did insure against war risk and he looked to that insurance for his protection.

299

The events that happened after the charter was made have been outlined by Mr. Murphy, I think, very fairly on the whole. The vessel loaded Army supplies and materiel and proceeded to the Philippines under naval routing orders.

The naval routing orders were not given to this vessel because the United States owned the cargo aboard it. Naval routing orders were given to every ship that plied either the Atlantic or the Pacific at that time. They were orders which the Government gave to all ships as a sovereign in view of the threatening situation in which the nation was.

300

The vessel proceeded pursuant to those naval orders, military orders, until Pearl Harbor. There were then general orders issued to all ships at sea at that time in the Pacific to proceed to friendly ports. Shortly thereafter the Navy issued specific orders to various ships, that were bound for the Philippines, to go into the Fijis for further routing orders in view of the outbreak of war.

The *Portmar*, after first running a little bit to the south of her course, by virtue of the master's own decision that that was the safest thing to do, followed the specific orders that he received and went to the Fijis. The Fijis were south of his original course and were safer waters under all the circumstances.

262 The claim of Calmar Steamship Corporation, as stated in the libel against the United States, which is the second action which your Honor read into the record when these proceedings began, is an alternative action. If your Honor finds that there was a constructive total loss under the war risk insurance, then the action against the United States will be withdrawn.

The action against the United States claims charter hire which, by the terms of the charter, would cease if a constructive total loss under the policies occurred. That 263 is the first cause of action against the United States.

The two other causes of action against the United States are predicated on the alternative that your Honor may find, and in accordance with the contentions of the underwriters, that they aren't liable at all for the damages sustained by the *Portmar* and were, to put it briefly, off the risk at the time of the casualty.

If your Honor comes to that conclusion, then the second and third causes of action against the United States claim indemnity from the United States on the ground that the very events which caused the underwriters to be discharged from liability were events caused and perpetrated 264 by the agents of the United States and, thus the United States is bound in both express and implied contract to indemnify the owner of the *Portmar* for the recoveries it would have made against the underwriters if they had not been discharged from liability.

The questions involved in the suit against the United States are many and complex. They need not be considered at all if, in the first action, the decision is that the *Portmar* constituted a constructive total loss by reason of the damages sustained by enemy attack. And only the first cause of action against the United States need be dealt with, that is, the claim for charter hire, if the Court finds that the *Portmar* was a partial loss and that the war risk underwriters are liable for the partial loss.

The war risk underwriters have pleaded a variety of defenses and have tried, by every possible twist, to escape liability for the risk that they undertook under these policies.

There is no question about the issuance of the policies. There is no question that they were paid the premium. And there is no question that they wrote these policies at a time when all the world knew that matters were moving toward a crisis in the Pacific. But now that the damage has occurred, the underwriters have striven by every artifice to escape this claim. 266

I do not propose to deal with all the defenses that are pleaded. They have been discussed in the trial briefs that are already before the Court. I simply wish to point out two considerations that I would like the Court to bear in mind as it receives the evidence in this case, and that is that the underwriters have sought to claim that when the *Portmar* was diverted by United States naval orders to Suva in the Fiji Islands, and there directed to proceed to Australia, also by naval orders, they have made the contention that they insured the vessel by special agreement only to Australia, and they have contended that they were discharged from liability when the vessel arrived at Sydney, Australia, and lay there for 24 hours in safety. That 267 contention flies in the teeth of the cable which requested that the underwriters hold the *Portmar* covered by reason of this diversion, and we shall show your Honor the precise language of that cable.

The next point that I wish to call your Honor's attention to is that the underwriters appear to place considerable emphasis on a contention that everything that was done by the *Portmar* on this voyage was voluntary because the United States was constituted as the agent for Calmar Steamship Corporation to give orders to the vessel.

That theory is entirely unsound and contradicts the established nature of a time charter, or a voyage charter on a time basis, and we shall show the Court that under

the kind of charter involved in this case, the owner was the owner of the vessel, the master and crew were his servants; the owner was the operator of the vessel. The United States was entitled to the use of the carrying space of the vessel under a time charter and this charter was for a voyage on a time basis and therefore there was no agency whatever, and what happened was that the United States, and in its sovereign capacity, gave orders to this vessel which, of course, the master of the vessel was bound to comply with. Everything that was done was absolutely involuntary on the part of the vessel, her master and her
269 crew.

The reason for my mentioning those points is that the facts of the case show that the *Portmar*, while on a voyage to Manila and return, was diverted by naval orders when the Japanese attacked Pearl Harbor and sent to Australia; and from there on, every single move the vessel made was pursuant to orders either of the United States naval authorities or as delegated to the British naval authorities in the Fiji Islands, or, as again delegated, to the Australia naval control in Australia, or as given by direct agencies of the United States, namely, the United States Army authorities at the various Australian ports.

270 The facts, in brief, are as follows: The *Portmar* was chartered to the United States for one round voyage, San Francisco to Manila, Philippine Islands, and return, either at a U. S. Atlantic or U. S. Pacific port.

The charter was made as of November 21, 1941. The war risk insurance was written and issued by a binder November 26th and November 27, 1941.

The vessel sailed from San Francisco laden with United States Army supplies for Manila.

The vessel was chartered to the Maritime Commission and was allocated to the War Department and was laden with United States Army supplies for Manila.

She sailed on November 28, 1941. Before she sailed the United States naval authorities at San Francisco gave

the master sealed orders, and in those orders were successive positions through which he must pass in making the voyage. Those positions routed the master a few hundred miles south of Hawaii and down close to New Guinea and over through the Torres Strait north of Australia, thence west through the Arafura Sea, thence north to the Philippine Islands. The sealed orders also imposed radio silence on the master after he passed a position a short distance outside of San Francisco.

The master followed those orders until the morning of December 7th when the radio brought the news of the attack 272
on Pearl Harbor. The master, realizing that the naval course laid down for him carried him very close to Fanning and Christmas Islands, if not between them, that were ahead of him, and knowing from his prior experience that there were cable stations on those islands and figuring that if the Japanese had attacked PearlHarbor they would certainly be at Fanning and Christmas Islands, where the cable landings were, and fearing if he continued on that course he would sail right into capture or destruction, not receiving any orders as to what to do, he turned to the left and headed south, intending to wait until he received orders from the Navy as to what to do in view of this 273
crisis that had occurred.

Four days later, on December 11, he receives the order he expected. It directed the *Portmar* and other vessels to proceed to Suva in the Fiji Islands and there take orders from the British naval authorities.

The master complied. He went to Suva and was ordered to go to Sydney, Australia, and there report to the Australian naval control. He went to Sydney and there reported, and also consulted the American Consul at Sydney and asked if he should continue to follow these orders that were given him by British and Australian authorities, and the Consul said absolutely it should be done.

At Sydney he was directed to go up the coast to Brisbane. At Brisbane much of the cargo was unloaded, sorted out,

some of it reloaded, and he was then ordered to proceed to Port Darwin on the north coast of Australia.

He complied with his orders and, in due course, arrived at Port Darwin. At Port Darwin the Australian naval control and the United States Army authorities there ordered him to discharge all of his cargo except a small quantity of drums of gasoline, about 500 drums, and thereafter they loaded enough drums to make up a total of 2,000 drums of gasoline, and the Australian naval control ordered him to take them to Wyndham on the northwest coast of
275 Australia, there discharge and return to Port Darwin. He complied and returned to Port Darwin on the 12th of February. He was ordered by the Australian naval control to shift alongside the pier the next morning to load a detachment of the 148th Field Artillery, and the United States Army authorities told him that he would cary that artillery to the Island of Timor, the Port of Koepang. The master obeyed, and the artillery was loaded on his vessel with the troops, about 300 to 400 troops and their munitions. The master was then ordered to report on board the United States Cruiser *Houston*, then lying in the harbor, which would be the military escort of the convoy. He was ordered to report there for convoy orders.

276 That night, the night of February 14th, he reported on board the *Houston* and, in the presence of Captain Rooks of the *Houston*, the Australian naval control officer gave him orders to sail in convoy of the *Houston* for Koepang, Timor.

The convoy left Port Darwin shortly after midnight and proceded out through the Timor Sea, and during the 15th, and at about noon on the 16th of February the convoy was attacked by Japanese bombers and the convoy dispersed. The *Portmar* was somewhat damaged, to what extent is not precisely known, by near misses of bombs. The *Houston* thereupon ordered the convoy to return to Port Darwin and escorted the convoy back to that port.

The convoy arrived at Port Darwin at about noon on February 18th, and the *Portmar* anchored in the harbor, awaiting further orders. On the morning of the 19th, at about 10 a. m., a devastating attack by Japanese aircraft occurred at Port Darwin and many ships were destroyed, destroyers and merchant vesels alike. The *Portmar* was heavily damaged by cannon fire, machine gun fire, and by bomb fragments from bombs falling close to her sides in that attack.

The master decided to beach the vessel to keep her from sinking in the harbor. Certain casualties occurred on board, 278
who were taken off the vessel by an Australian naval corvette. The vessel was beached on the east shore of the harbor, some miles south of Port Darwin. The troops were taken off, the crew were sent ashore and quartered at an Army camp some distance away. Thereafter the crew were repatriated and sent home to the United States. The master remained in Australia to do what he could in the interests of the vessel.

All during these events the owners of the *Portmar* had no contemporary knowledge of what was going on. They received word of the various events long after they had occurred. The master endeavored at every possible point
to send word to his owners as to what was going on but 279
was unable to do so.

When the master left the vessel for the last time, on March 3, 1942, she lay aground astern, badly listed to port. Her decks were submerged from stern to midships at high water, the tidal range there being around 27 feet. She had been seriously damaged throughout her hull. The master regarded her as a hopeless loss.

We will ask the Court to consider the situation as it existed at that time and as it continued to exist until the 8th of April 1942 because, on the 8th of April 1942 the owners, after receiving word from the master, after he got to Melbourne by traveling overland, after having received a letter from the Maritime Commission, stating what their

agents in Australia thought about the vessel, and taking into account the fact that the vessel lay 2500 sea miles from the nearest drydock, at a port where there were no facilities for repair whatever, with the Japanese air force dominating the air during daylight hours, so that work could be done only at night, with the Japanese navy dominating the sea because, your Honor will recall, the *Houston* was run down and sunk only two weeks after the attacks which I have described to the Court, and there was nothing left to oppose the Japanese navy at that time, with a full scale invasion of Australia expected from minute to minute by the Japanese forces, the owners concluded that in the high probabilities of the situation it would cost more to recover and repair that vessel than the amount of her insured value as provided in the policies and tendered the abandonment of the wreck to the war risk underwriters.

If there ever was a case of reasonable probability and high probability justifying abandonment as for a constructive total loss, this is the case.

Your Honor will recall that the master last saw the vessel on the 3rd of March because he and his crew were sent overland to Melbourne by the Army, and the crew was repatriated from Melbourne. In the interim, between that date and the 8th of April, the power of the Government began to move and they were able to do things that a private shipowner could not do. The United States Army apparently decided to salve that ship for what she could be used as a military expendable vessel, not to restore her to her former condition, but just to patch her up so she could float and move.

The Australian Government arranged that large pumps necessary to pump that vessel out be sent overland a couple of thousand miles by rail and across the desert by trucks to Darwin. They sent a salvage expert up there. Working at night time, and patching the ship, and using these pumps, and getting steam from Government craft to work the pumps, he succeeded in pumping the water out of the vessel,

and floating it, so that she would float at anchor in her patched condition. The facts on April 8th were that she had been floated on April 5th. She was no longer aground on April 8th but every other fact that I have described, which existed when the master last saw her, still applied. She was lying afloat at anchor, with the pumps going day and night to keep her afloat, and the prospect of ever getting her towed to a port of repair, if it could be done at all, involving very high expense, the cost of repairs to restore her to the condition she was in before the enemy attack, if it could be done in Australia at very high probable cost, 284
and she was saddled with a salvage lien as she lay there, and what that would amount to would remain to be seen—so, putting it all together, on the 8th of April, the high probability was that that vessel was a constructive total loss.

As I stated before, she was towed eventually to Brisbane. But when? She was towed to Brisbane, leaving Port Darwin in June 1942. And what had occurred between April 8th and June? The Battle of the Coral Sea, in which the United States Navy cleared those waters of the Japanese navy and made it possible to tow the ship 2,000 miles to Brisbane. It was not known on April 8, 1942, that the Battle of the Coral Sea was going to take place on the 4th-9th of May, 285
and it wasn't known that the United States Navy and Air Force were going to be victorious. And that was the first great event that occurred after the abandonment to the underwriters which began to clear the situation up somewhat.

So the Australian Government arranged for tugs to tow her and a riding crew to ride her 2,000 miles around to Brisbane.

When she got to Brisbane the master came up from Melbourne to meet her and he arranged immediately for the best man he could find in Brisbane, the local representative of the American Bureau of Shipping, a classification society—this vessel was classed in Lloyds but American

Bureau of Shipping is the corresponding classification society in the United States—to give him a report. That surveyor, with his associate, an engineer, went over that ship and they made a written report to the captain, which stated that they estimated that the repairs necessary to restore that vessel to her pre-bombing condition were 120,000 Pounds Australian.

If your Honor will permit me, I will deal in Australian Pounds, and I will ask the Court to assume that the insured value of the vessel, $860,000, amounted to 264,615 Australian
287 Pounds, the exchange rate being 3.25.

Salvage claims were then asserted against that vessel by the Government of Australia and by the private salvage company and the individual Williams, who was the salvage expert that directed the operation, in the total sum of 150,000 Pounds Australian. We did not know then what the towage actually cost, but it has subsequently developed that the actual out-of-pocket cost paid by the United States Government to the Australian Government amounted to a total of 17,973 Pounds Australian. That takes no account of military labor that was engaged in it. That is the actual expenditure. The total of those three items alone exceeded the insured value.

288 So, on the high probabilities of April 8th, if the subsequent events are to be considered at all, the first intelligence that the owners received as to the costs involved in repairing that vessel, justified their estimate of the situation on the 8th of April.

Using a large amount of military labor, the vessel was cleaned up to a considerable extent and a lot of work done on her at Brisbane. What was done we don't know. She was in the hands of the Army. As I said, the Army decided to patch her up as an expendable ship, and they did all this work.

She was then moved to Sydney under her own steam and there a joint survey took place, after she had been put on drydock. It turned out, when she got on drydock, that her

bottom was damaged to a very slight extent, although the estimate before had been that her bottom had been seriously damaged. The joint survey at Sydney reported that the amount of repairs necessary to restore the vessel to her prior condition—doesn't say for classification, but it may be assumed that that is what they meant—would amount to 28,000 pounds Australian. That report was made in February 1943, a year after the damage, about nine months after the abandonment to the underwriters, after a vast amount of work had been done on her; and after the actual condition of the vessel had become actually known and 290
ascertained.

That survey report at Sydney is a fact, but it cannot outweigh the other facts of the case as affecting the high probabilities of the situation as they faced this shipowner on April 8, 1942.

The underwriters rejected the abandonment of April 8th but agreed that the assured would be in the same position as though he had actually started suit on that day. That is the usual practice. Thus, April 8th is the critical date to determine the high probabilities which justified the tender of abandonment.

I think that gives your Honor an outline of the situation. 291

Calmar Steamship Corporation, as libelant, therefore claims to recover from the underwriters for a constructive total loss. If the Court should find, despite the evidence and our contentions, that there was not a constructive total loss, Calmar Steamship Corporation claims from the underwriters recovery of their actual cost and expenses as a partial loss.

I should say, before closing, that while the vessel still lay at Brisbane, the United States requisitioned title to the Portmar November 17, 1942. On that date the United States became the actual owner of the damaged vessel and, of course, is liable to pay to Calmar Steamship Corporation just compensation for the value of the damaged vessel as

When he arrived in the Fijis he got further routing orders, sovereign orders, given him by the Navy, not because the cargo was United States cargo but because all ships bound to the Philippines at that time had to be diverted because war had broken out and had to be routed south of the usual lanes to the Philippines. 301

The master followed those routing orders which the Government gave, not as charterer but as sovereign, and proceeded to Sydney.

At Sydney he reported to the Army authorities and the Army authorities in Australia for the first time learned that he had Army supplies, Army materiel, useful military equipment aboard, and the Navy, through the Australian routing control office, gave him routing orders carrying him up toward Darwin. 302

The situation in Australia at that time was critical. We intend to show just how critical it was. The Japanese were at the point of their greatest expansion. The Navy had withdrawn from the waters north around Port Darwin, invasion was momentarily expected, the islands of the East Indies were under Japanese attack, Japanese invasion, and the military at that time was controlling every vessel, every cargo, every piece of equipment that had value whatsoever in a military sense with a view to using it for military purposes as military necessity dictated. They were not inquiring into whether the United States was the charterer, or the property belonged to X, Y or Z. They were finding out what ships were in Australian waters, what material was available to the armed forces of the United States and of Australia to meet the Japanese threat, and were ordering that material sent where it was needed most. 303

After the Army learned of the nature of the *Portmar's* cargo, after it had been given details as to the *Portmar's* characteristics and so forth, the Army gave military orders, which the master received in Brisbane, to have the materiel taken off the vessel, sorted, accurately appraised for usefulness, and gave other orders which caused a good deal of

it to be reloaded together with certain other cargo, and the material sent up to Port Darwin where the invasion was expected.

She unloaded her cargo at Darwin for the most part. A little bit of it was sent on to Wyndham. She came back and she received military orders again to proceed from Darwin to Timor with military supplies, artillery and some artillery officers and men. Those orders were not given by the United States as charterer. Those orders were given as military orders by military people faced with an immediate invasion. She proceeded to join a convoy and was given
305 the usual convoy instructions at a convoy conference. She proceeded enroute to Timor until she reached a point that was not very far from the point through which she would have passed if she had followed her original naval routing instructions, and at that point the Japanese air force spotted the convoy, attacked it and badly shook up the *Portmar* with the concussion of near misses and caused the convoy to turn around and go back to Darwin.

At Darwin she was attacked again. I think Mr. Murphy has described what took place there so well that I needn't go into it at any great length, but I do want to point out that at Darwin she had not had an opportunity to unload
306 her military supplies and equipment, and particularly her artillery, when she was so badly damaged that her master beached her and abandoned her as a total loss.

The Army authorities, as a military proposition, wanted to get the artillery off the *Portmar* and they arranged to have her surveyed from the point of view of getting her afloat so she could unload her artillery, which they desperately needed. In the course of those surveys it was determined that she could be kept afloat and gotten to Brisbane where she might be patched up.

The situation in Port Darwin was such that no commercial salvagor could be induced by commercial interests to risk putting equipment and men into a venture for salvage purposes. This was a military decision to salve the vessel.

It could not have been done by a commercial owner. It was a decision made to risk the lives and equipment of the military in order to get military equipment that was needed at a point of military advantage, and you cannot assess the out-of-pocket cost of the military in any such operation as being the cost to the owner of having any such operation performed.

The military successfully performed the operation of getting this vessel afloat, and through arrangements made by the military with the Australian Commonwealth Salvage Board this vessel was towed back to Brisbane, at a time 308
when the Japanese submarines were active in the area, at a time when the entire route was subject to Japanese aerial attack, by proceeding at night, hiding in coves during the day, taking, I think, some 64 days in the process of bringing her back, and, as a great feat, the *Portmar* was successfully salved.

The Government intends to show that any such salvage attempt which commercial interests might arrange for could only be arranged for under a no cure, no pay salvage contract, and that the award that would be made to a commercial interest attempting to effect any such salvage would be very high.

The Army, after getting the vessel back to Brisbane, 309
proceeded to clear the indescribable mess in which the vessel was, cleaned the muck and debris off her, and then, for the first time, began to get an idea of what would be involved in fixing her up.

At that time the Army concluded that she could be patched up for use on military missions as an expendable vessel and decided to go ahead with the patch-up job. They patched the vessel up without any thought of putting the vessel back into class or into commercial operating condition, using the labor of enlisted men for the most part, having access to a shipyard scrap pile from which they took whatever scrap materials could be used for patching purposes, having access to the wrecked hull of a Liberty ship that

had broken in two after stranding in the harbor, from which they took a good deal of material.

They got the vessel back into operating shape, formally requisitioned title to the hull, and used her for two voyages, and lost her to the Japanese by torpedoing.

On that state of facts the Government contends, first, that this proceeding is not proper; that the proper remedy, if any, that the owner has against the Government for the relief sought in the libel in this action should be obtained in the Court of Claims. A rather technical question, and I think it has been discussed fully in the Trial Memorandum.

311 Briefly, we say that if the *Portmar* should be considered as a vessel of the United States at all, she was a public vessel of the United States and that a suit upon a contract with respect to the operation of a public vessel of the United States is not cognizable in the United States District Courts, but should have been brought in the Court of Claims.

But on the merits, our contentions are four. We say, first, that this loss was within the coverage of the insurance which the owner took out for his own benefit and for the benefit of the United States, and that no question arises as to whether the United States is liable for the damage sustained by the vessel in Darwin because the underwriters

312 are liable, and that the insurance is for the benefit of both the vessel's owner and the United States.

We say that everything that the vessel did from the time it left San Francisco until it was beached was either in pursuance of the original voyage on which the vessel sailed, or was following compulsory military orders which a vessel's master is always under a moral obligation to follow, and not only a moral obligation but a very physical compulsion to follow, and that none of those changes from the original itinerary had the effect of relieving the underwriters of liability.

The Court: You would not say that a change of itinerary was justified by a moral obligation?

313

Mr. Smith: I think the case law is very clear that if the lawful authorities give a lawful order, there is no obligation to resist that order.

The Court: Then it is compulsory.

Mr. Smith: It is compulsion, even though the authority doesn't happen to be able to physically enforce it at the moment.

The Court: It is more than a moral obligation. It is compulsion.

Mr. Smith: That is true.

The second point I make is that if, by any chance, there was some event which destroyed the coverage, the insurance, the United States is not liable for the loss because we did not assume liability as insurer for any damage which this ship may incur; that the damage is not the result of any charterer's order, but of military orders, sovereign orders, with respect to which the United States is not liable as a charterer. 314

The third point is a rather technical one, that if, by any chance, the actions of the military authorities be regarded as amounting to a taking of the ship for a period which would prevent the vessel from ever completing the original voyage, or the original purpose contemplated by the charter party, such action may have had the effect of frustrating the charter party, in other words, putting an end to it, by reason of creating a change in circumstances which was not contemplated by anyone that was a party to the contract at the outset, and that the law is that when a charter party or other contract has been frustrated, the courts will not enforce any obligation whatsoever contained in such a frustrated contract. The loss, in case of frustration, is left by the courts to lie where it falls and no action upon such a frustrated contract may be maintained. 315

With respect to the liability of the United States to pay charter hire after the vessel was beached and abandoned, we take the position that the vessel was a constructive total

loss within the meaning of the charter party at the time it was abandoned, and that by the express terms of the charter the Government's obligation to pay hire ceased.

We say that the meaning of a constructive total loss in the charter party is not the same as the meaning of total constructive loss in the insurance policies. We do not consider a decision that the vessel was or was not a total loss within the meaning of her insurance policy has any bearing on the question of whether she was a total constructive loss under the meaning of the charter party. The charter party was a marine contract made before any insurance
317 was taken out. It was made without any reference to a formula for determining whether a vessel is a constructive total loss, and with reference to the American definition of a constructive total loss, which is that, a vessel is deemed to be a constructive total loss, if at the time of the vessel's casualty the high probabilities are that it would cost more than half the ship's value to restore her.

We say, further, if by any chance the Court finds she was not a constructive total loss within the meaning of the charter party when she was beached and abandoned, we are not obliged to pay any additional charter hire beyond that date because the owner, as it has represented in this court,
318 elected to treat her as a constructive total loss and made no further effort to fulfill its obligations under the charter party.

Under the charter party the owner was obliged to use due diligence to put the vessel back into seaworthy operating condition. The owner thought she was a total loss and made no effort to do so. And having elected to treat the charter party at an end, having failed to take any steps whatsoever to fulfill its obligation, it is estopped from claiming hire for the period after the beaching.

(Short recess.)

Mr. Mount: May it please the Court, the facts of this case are a very vivid story of how a vessel started as a commercial vessel on a round trip to the Philippines and back to the U. S. Pacific Coast and ended as a warship, loaded with soldiers, guns and ammunition, a unit in an invasion expedition of foreign territory for the capture of the Port of Koepang, which had already been bombed by the Japanese. 319

The argument of the libelant is that the underwriters insured those final stages of the operation of the *Portmar* when they insured her as a commercial vessel for a round trip at a premium of one and a half per cent. 320

I will ask the Court to take judicial notice of the amount which you as an individual, or, rather, the rate that you as an individual pay for insurance against fire, against burglary, or what not. As Judge Storey said, "The rate of premium charged by underwriters is not determinative of the risks which they covered but is very significant of whether they covered usual or unusual risks."

We must consider what was in the minds of the parties when the charter party was made and when the policies of insurance were made.

The Court: How does that become material unless there is some ambiguity in the policy? I mean, how does the rate of premium—you will pardon me for interrupting, but that thought comes to me—how does it become material what rate of premium is charged if the policy is clear and definite in its terms? 321

Mr. Mount: If there is no doubt in the words used, then I take it that the rate of premium is something that was decided by underwriters——

The Court: Do you argue, so I can understand you—I don't want to interrupt your opening, but the purpose of these openings is to fix my attention on the issues—do you claim that the terms of the policies are ambiguous?

Mr. Mount: I claim that the rider of the policy, which is what the libelant relies on principally, can be explained as

a matter of logic and in the light of certain decisions, one by the Circuit Court of Appeals here and another by the Supreme Court, but that the Court might think that there was ambiguity in that clause and, if there is any ambiguity, it must be construed against the party who proffered the clause, namely, the libelant's own broker.

The Court: Do you urge that the terms of the policy are ambiguous?

Mr. Mount: I don't think so.

The Court: All right. Do you urge that they are ambig-

323 uous?

Mr. Murphy: Not at all, sir.

The Court: Mr. Smith stands by the side on that. He has nothing to do with that.

So there is no contention by either the libelant or the underwriters that the policy, in its terms, is ambiguous?

Mr. Mount: No.

The Court: Then I don't see how the rate of premium comes in, or how the intention of the parties comes in.

Mr. Mount: Well, the Courts have said that even where there is no ambiguity, the rate of premium can be considered. However——

The Court: I don't see it, Mr. Mount.

324 Mr. Mount: I rely on the facts and the wording of the documents.

The Court: Yes. Let me ask you a question, now, just for my guidance as you continue, does it disconcert you or does it interrupt your chain of thought for me to ask questions as you outline your case?

Mr. Mount: I would be very glad to have you ask questions.

The Court: If it does, I will save any questions I have until you are through.

Mr. Mount: I should be glad to know how your Honor's mind is working as we proceed.

The Court: All right.

325

Mr. Mount: The Court must consider what was in the minds of the parties when the contract was made. The charter party to the Maritime Commission expressly states that it was a hire of the vessel for trading for one round voyage to the Philippines.

Referring to a remark which Mr. Smith made, that the insurance was for the benefit of the United States, I point out that the charter party expressly provides, on the question of insurance, and this is in article 2.17, that insurance shall be provided on the vessel which shall be made payable to the owner, that is, the war hull insurance. When it comes to liability insurance, it is specifically provided that war risk protection and indemnity insurance for the benefit of the owner and the charterer, as their interest may appear, shall be taken out. In other words, the insurance which is indemnity insurance, that is, protection insurance for liability, shall be taken out for the benefit of both the owner and the Government, but on the hull itself the only provision is that the insurance shall be taken out payable to the owner.

326

I also have one more clause to refer to in the charter, which provides, and this is in article 2.11, the charterer shall indemnify and hold harmless the owner, the master and the vessel from all consequences and liabilities whatsoever arising from compliance with any orders or direction of the charterer or its agents.

327

As to the insurance policy, that is headed in the upper left-hand corner—it mentions Calmar Steamship Corporation as the assured, and in capital letters says "For account of themselves." It doesn't say "For account of whom it may concern," nor does it mention the United States. Our relations are solely with the Calmar Steamship Corporation.

In that policy is described the limits of our insurance in these words, "at and from United States Pacific port to port or ports in the Philippine Islands, whilst there, and return to United States Pacific port or United States Atlan-

tic port via Panama Canal, while in port for 24 hours after arrival."

Then it also has the held-covered clause, which reads, "held-covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage provided prompt notice be given these insurers when such facts are known to the assured and/or their managers and an additional premium paid if required."

And then finally there is the rider which excludes claims arising from capture, seizure, arrest, restraint, detainment, requisition, nationalization or condemnation by or
329 under the authority of the Government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them, but unless the insured vessel is condemned, and this vessel was not condemned, this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, and then it includes even marine losses, or by stranding, sinking, burning or collision, providing such losses would not be covered by a marine insurance policy (in the form hereto
330 attached) warranted free of claims arising from capture, seizure or detention.

The first point of our defense is that the voyage which we insured had terminated before the event of her damage. There was the policy description of what we insured.

You remember she arrived at Sydney, was sent on to Brisbane, discharged half her cargo there, was sent on to Darwin and discharged almost the balance of her cargo there, and then was sent on to Wyndham with what was left, about 2,000 drums of gasoline, and the last of her cargo was discharged at Wyndham. While she was at Darwin, Calmar learned that she had been diverted to Australia and their brokers sent a cable to the London brokers, which reads—this is stipulated—which reads, "*Portmar* diverted to Australia on outward voyage under Govern-

ment orders Stop Hold-covered pending further advices." That was shown by Stephens to underwriters, and Stephens wrote back—Stephens being the London broker—wrote back to Mather, the Philadelphia broker of the libelant, by letter, which is also stipulated——

The Court: Stephens was the agent of the underwriters?

Mr. Mount: No, Stephens is the agent of the assured. I will cite cases that the broker employed by the assured——

The Court: Yes.

Mr. Mount: —is the agent of the assured. 332

The Court: But I thought that Stephens was the managing agent of the underwriters.

Mr. Mount: Oh, no.

The Court: He is not? All right.

Mr. Mount: You agree with me that Stephens is a London broker——

Mr. Murphy: In part that is correct. Mr. Mount is quite correct. They are our agents for some purposes, your Honor will find in this case. In some respects they acted as agents for the underwriters. They had a dual capacity.

The Court: Ordinarily I would assume he is the agent of the assured. 333

Mr. Mount: That is true.

The Court: I didn't know whether they function in this case as a broker or agent for the underwriters. In this case you claim that Stephens functioned as the broker——

Mr. Mount: Broker.

The Court: —and not as an agent for the underwriters?

Mr. Mount: That is correct.

Stephens wrote back to Mather—Stephens and Mather are correspondents——

The Court: I have the situation.

Mr. Mount: (Continuing) Wrote back, "We have your" —this cable was sent the 24th of January 1942 while the *Portmar* was first at Darwin—"We have your cable of

the 24th January last advising that this vessel insured for the voyage from the U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders. We confirm that all underwriters on our war risk policies have agreed to hold this diversion covered pending your further advice."

That changed the insured voyage from a round trip to the Philippines and back, let us say, to a round trip to Australia and back. That is the broadest interpretation, certainly, that anybody can give to it.

335 The Court: That is putting a limited construction on it.

Mr. Mount: I beg your pardon?

The Court: That seems to me to be putting a limited construction on it but, all right, I will study that.

Mr. Mount: Yes, all right. They say that the underwriters have agreed to hold this diversion covered.

The Court: Until further word.

Mr. Mount: No, they don't say that.

The Court: What is that last clause?

Mr. Mount: That is what Mather asks.

The Court: That last phrase you read there.

Mr. Mount: About the underwriters?

336 The Court: What does Stephens say? What is last phrase of Stephens' letter?

Mr. Mount: "Have agreed to hold this diversion covered pending your further advices."

The Court: Further advices?

Mr. Mount: Yes, and this cable was sent referring to it as a diversion on the outward voyage.

The Court: All right.

Mr. Mount: At Wyndham the last of the cargo was out and the vessel was then ordered back to Darwin. Wyndham is west of Darwin. And as has been explained the vessel on February 13th and 14th was loaded with three to four hundred U. S. soldiers, field guns, ammunition, and was ordered to go to Koepang.

The Court: Where do you claim the coverage ended on the voyage, at what point?

Mr. Mount: We say that the coverage ended when there was a determination to do something with the vessel other than make it a round trip back to the United States.

The Court: Where do you claim the vessel was when your coverage ended?

Mr. Mount: Well, I say——

The Court: Do you claim it ended at Suva?

Mr. Mount: No.

The Court: Do you claim it ended at Darwin? 338

Mr. Mount: No.

The Court: Do you claim it ended at Wyndham?

Mr. Mount: We say the coverage ended at Wyndham——

The Court: At Wyndham?

Mr. Mount: (Continuing) When the last of the cargo was out and she was then ordered to do something else.

As evidence that there was no intention to send her back to the United States, or use her as a cargo vessel, is the small detail that when she got back to Darwin the chief officer testifies that all her cargo dunnage was discharged.

The master was told to go aboard the Cruiser *Houston* 339 and, in my brief, as your Honor has read, the Commander of the *Houston* said, "Koepang is too hot a place for me. I'll take you to the entrance of Koepang. I am not going in. You will have to get in yourself."

And the *Portmar* was loaded, not only with the men and the guns and the ammunition, but she was also loaded with a landing boat for the soldiers. There was a heavy launch that was put on board of her, so heavy that it took the *Portmar's* 30-ton derrick to handle it.

Our first point is that the side trip out of Port Darwin had no connection with the voyage which we insured, that voyage having been amended by the exchange of cable and letter.

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Our second point is that even if the insurance should be held in force, it doesn't cover risks to which the vessel is intentionally exposed, and on that point the courts have held, for instance, in the case of where there was insurance against capture and the vessel sailed without ship's register and without a cargo manifest, and she was captured by a British cruiser, the Court said, "To have sailed without her documents is inviting capture, and even though capture was mentioned in the policy, the underwriters are not liable for the risk to which she was exposed in that extreme manner."

341 Then there is a case—I am speaking of cases because we haven't very much—we haven't introduced any testimony here——

The Court: How do you claim that there was a wilful exposure of the ship in this case?

Mr. Mount: Because——

The Court: I mean, I don't compare this to a sailing without proper documents which would make it subject to seizure.

Mr. Mount: Well, she was——

The Court: Here frustration is claimed to have occurred by reason of an act of war by an enemy.

342 Mr. Mount: Yes, and she was sent over towards a port which had already been bombed by the enemy as part of an invasion expedition which, of course, invited retaliation by the Japanese. The Japanese had already bombed the Port of Koepang, and on the way over towards Koepang they encountered Japanese war planes, a squadron of 27. Now, that was inviting enemy attack. It is just like the case——

The Court: It would have been subject to enemy attack anyway because it was a ship flying the flag of a hostile nation. Go ahead. The thought comes to me, on your first point, Mr. Mount—here is something that troubles me—the original policy contemplated a return voyage——

Mr. Mount: Right.

The Court: (Continuing) Return to the home port. Doesn't this cable from Stephens contemplate a continuance of the voyage and a return to the home port?

Mr. Mount: It specifies Australia. It agrees that instead of the Philippines, Australia shall be substituted, and it covers that diversion to Australia.

The Court: The mere fact that I ask these questions is not intended to indicate to any of you counsel that I have any definite opinion. I am asking them in a search to get your positions definitely defined.

Mr. Mount: I am glad to have you ask questions, sir.

344 Another case of intentional exposure to a risk which is covered in the policy is the ice case, where the policy insured against collision, and the court held that collision with ice was collision within the policy, but where the ship had been forced through an ice floe, it was not covered because underwriters do not cover risks to which the ship is intentionally exposed.

We do not deny that at the time this insurance was placed relations were strained between Japan and the United States, but we say that what our policy covered was war losses which came fortuitously, as the decisions say, to the vessel, not those losses to which she was intentionally exposed.

345 Then there is also another case, a decision by Mr. Justice Clifford, sitting on Circuit, where a vessel was time chartered to the War Department, and suit was brought against the underwriters. The policy covered perils of the sea, including stranding. The War Department ordered the vessel to cross a bar when there was insufficient water and she stranded. And Mr. Justice Clifford held that that was not covered by the perils of the sea in the policy and that——

The Court: I don't see the analogy. On this point you are urging now, I don't see the analogy of those cases where the underwriter is relieved where there is a wanton, wilful and intentional disregard of the safety of the ship.

346 Mr. Mount: Exactly.

The Court: I don't know that you have such a situation here.

Mr. Mount: Well, let me point out that this case——

The Court: Suppose the master of the ship said, "Now, I am not going to run this ship up there"? What do you think would have happened? He didn't seek out this danger. It was forced upon him, wasn't it?

Mr. Mount: May I point out to your Honor that there is no case in the books which has this situation of where a
347 commercial vessel was taken over by the Government and used as a war ship and a claim made against underwriters. You have before you a case of novel impression, and we contend that there is no difference in principle whether the master did this of his own volition or whether he did it because the United States Army said he should do it. The point which I want to make clear is that the vessel was intentionally exposed to a risk which was not within the minds of the parties when the insurance was placed, or within the words of the policy.

The next point we urge is that if your Honor should hold that the insurance still covered the vessel at this time, then the held-covered clause of the policy applies. If it covered,
348 it must be under a change of voyage, and that provides for an additional premium. We have taken testimony on that. I have referred to it in my brief.

The Court: On this cable from Stephens, it was incumbent for the underwriters to state what additional premium they requested or wanted, wasn't it? How could the owner pay until he knew what he had to pay?

Mr. Mount: Well, we haven't any libel against Calmar for additional premium.

The Court: My point would be this, as I see it: The failure to pay the additional premium under those circumstances would give you an offset for the amount of the additional premium, but would that relieve you of coverage or liability?

Mr. Mount: Of course, our first point is that coverage had terminated.

The Court: Assuming that, you would just be entitled to an offset.

Mr. Mount: If your Honor says the coverage had not terminated, then your Honor must hold, well, the policy was in force and one of the terms of the policy is the held-covered clause, if there is a change of voyage because, under no view can the sailing from Port Darwin be considered part of a voyage from the United States or to the United States.

350

As to the rider, I don't want to make my argument too long.

The Court: You go ahead. I don't want to limit anybody in these openings because they are helping me focus my attention on the issues in the case and then, as the evidence is presented, or as I read the depositions that are introduced, I will know what to look for—at least I think I will know what to look for.

Mr. Mount: This rider, as we shall show by evidence, was proposed by Mather, the libelant's Philadelphia broker. The insurance is asked for in London by Stephens, the assured's broker, making out what is known as a slip, and this is also stipulated, and going around to the individual groups of underwriters on the floor of Lloyds and to the individual insurance companies and asking, "Will you give us insurance on these terms?"

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The Court: And they take participation individually?

Mr. Mount: That is it, and the underwriters initial—someone is authorized for each syndicate in Lloyds to initial, and the companies initial——

The Court: With the amount set forth.

Mr. Mount: With the amount that they will take of the insurance. In the same way, the policy is made up by Stephens.

And I want to ask, Mr. Murphy, if you have the original policy?

Mr. Murphy: Yes, I have.

Mr. Mount: It is a printed policy, isn't it?

Mr. Murphy: Yes, certainly.

Mr. Mount: May I see it?

Mr. Murphy: Certainly. There are three, if the Court please.

There are three original policies (handing papers to Mr. Mount).

The Court: All covering the war risk?

Mr. Mount: All covering the——

The Court: All covering the war risk?

353 Mr. Murphy: All for war risk. All for various parts of a total sum of $860,000.

The Court: Why were there three policies instead of one?

Mr. Murphy: One is for Lloyds Underwriters, the other is for the companies, and one is for the Excess Insurance Company, Ltd,

The Court: I see.

Mr. Murphy: But all make up the total sum.

The Court: All right.

Mr. Mount: This policy is also prepared by Stephens and is taken around, in the case of Lloyds, taken around to 354 the Lloyds signing office and they sign on behalf of all the underwriters.

But this clause, proffered by Mather, in the first part excludes any claims arising from capture, seizure, arrest and so forth by Great Britain or any of her dominions or allies.

In order to get away from two cases which had been decided, as I say, by the Circuit Court of Appeals and by the Supreme Court—the Supreme Court case being the *Llama*—underwriters, and this I expect to show by testimony, underwriters wanted to give the assured coverage from what might happen between the time the vessel was arrested, restrained or detained by the British or her allies and the time she got to a port for examination.

355

I expect to show that that was first given in a rider that applied to cargo and then the underwriters wanted to give shipowners the benefit of being covered during the time from the time of seizure to the time the vessel arrived at a port of search, and that that is what this clause means, and that right in the middle of the clause are the words "But this warranty shall not exclude losses otherwise covered by this policy," and that means losses having to do with the original voyage and the original nature of the vessel and does not cover the arresting power taking the vessel and using her as a warship.

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If the libelant's contention is right on the interpretation of that clause, it would mean that there would be no time limit on what the arresting or restraining government might do to the vessel and there would be no limit on the kind of thing it might do to the vessel as, for instance, sinking the vessel to close a port to the enemy or using it as a shield from enemy vessels.

The Court: Would you make a distinction between the seizure of a vessel or the use of a vessel as an instrument of war, where the sovereign had seized it and undertook to man it with its own crew or to swear in the crew as members of their navy or marine forces, and those instances where a sovereign would step in and direct the operation or the route of the vessel but still leave its operation to its original crew and master?

357

Mr. Mount: You mean where the use of the vessel was the same after the government took it, except in one case where its own crew——

The Court: In one case they took the crew over and they made them part of their organized armed forces, and another case you would have where they directed the operation or route of the vessel, and its destination and its use, but they leave its operation and management undisturbed in civilian hands.

Mr. Mount: I say in either case——

The Court: You would make no distinction?

Mr. Mount: I say in either case that would not be a loss otherwise covered by the policy. It would be a complete change.

The Court: Are there any decisions, Mr. Mount, that you know of on that point?

Mr. Mount: No, this is a new clause. It is an American clause.

The Court: Yes.

Mr. Mount: I requested London to advise me if there were any discussion over there because I couldn't find any over here, and there is no discussion over there.

The Court: It is an American clause.

Mr. Mount: It is an American clause, and I shall have to produce the witnesses in the organizations that drew up the clause and approved it and circulated it and from which Mather got the clause.

The Court: I suppose I will take it to make the record complete but I don't know what weight, if any, I will give that testimony.

Mr. Mount: It shows what the insurance market meant and understood by that clause.

Finally, as to constructive total loss, we argue that the rule of high probability does not apply where there is a formula set out in the policy itself, but even as to the high probability rule, may I just take a few minutes to refer to the situation of the *Portmar* as she lay in Port Darwin?

As she lay aground there, she was in 12 feet of water. Her mean draft was 12 feet 11 inches. The master said she could have remained there for a year without becoming a total loss or deteriorating. She rested on a clay bottom. She never capsized. She was in a sheltered place. Both anchors were down. She had only a 10 or 11 degree list to port when the master last saw her.

The Court: I understand it is the libelant's contention it became highly probable that the ship was a total loss, not so much because of the physical damage, although he does

urge that in part, but he relies in great measure upon the war conditions then prevailing.

Mr. Mount: Yes, but he made no inquiries about what could be done for the vessel. He was on the vessel after she was beached on February 19th, and he was on the vessel, according to his own testimony, seven or eight days after that, and during that time this expert salvor, Captain Williams, was there, salvaging the guns and ammunition. And the master met Captain Williams on February 21st, and the master didn't—the last time the master saw the *Portmar* was on March 4th. So that between those times 362
he saw Captain Williams on his own vessel while he was on his own vessel salvaging the cargo and he knew that he was an expert salvor because he says so in his testimony, but he carefully avoided asking him anything about what could be done to salvage the vessel.

In fact, he said that when he told Williams about that he was going to abandon the vessel, in two places the master said Williams seemed very much surprised. The captain says that the raising of the vessel would be an easy matter if you had the equipment there, but he never asked for the equipment.

It appears that when the master and crew were on 363
their way south, to Melbourne, on March 17th, the chief officer saw two centrifugal pumps on a flat car marked for Captain Williams and going north. It had taken the master and the crew seven days to get to that point. If you allow another seven days for those two pumps to get back to Darwin, they would have been there on March 24th. So that the actual salving of the vessel could not have been started before March 24th and in the judgment in the salvage action in Melbourne, the judgment of the Court pointed out that the pumps were put on board the vessel on April 4th and she was raised on April 5th.

I don't minimize what the master and crew of the *Portmar* went through, but I do say that the claims of the con-

dition of the vessel and their claims about the cost of towage and salvage are very much exaggerated.

There were two salvage claims made against the vessel, one by the government salvage bureau for a hundred thousand pounds, one by Captain Williams for 50,000 pounds, but those were not one claim in addition to the other. The question was, who was entitled to it, and the Court held that the Government Salvage organization was not entitled to it because, although Captain Williams subsequently became head of the Government Salvage organization, he wasn't doing any business for them at that time; he was doing business for himself individually and his private company, and that is why the government salvage claim for a hundred thousand pounds was dismissed by the court, and the salvage claim made by Captain Williams, which is so emphasized by the libelant, was found by the court to be worth 5,000 Australian pounds, just a little over $15,000.

The Court: Do you agree with Mr. Murphy, or is there any issue on whether or not I must determine whether the ship on April 8th was, because of the high probabilities, a total loss or not, that is, that that is the date I must take?

Mr. Mount: April 8th is the date.

The Court: Both agree on that?

Mr. Mount: Yes, we both agree on the April 8th. Situation on April 8th.

The Court: That is the time that I have to pay attention to.

Mr. Mount: That is the time you have to pay attention to, but, of course, your Honor appreciates that we say that not only——

The Court: You say that for several weeks before that it could have been determined——

Mr. Mount: No, no. We say that on April 8th there had not been inquiries made.

The Court: I see.

Mr. Mount: And the courts point out it must be the judgment of an owner, considering that he was on the spot.

Here no inquiry has been made. The high probability rule is not met and, in the second place, the high probability——

The Court: It is not applicable because of the policy provision?

Mr. Mount: Because of the formula in the policy, correct.

Then, the last point which we rely on is that in this decision by Judge Clifford, when he was sitting in Circuit, and a vessel was chartered to the Government and the Government ordered her to cross a bar where there was insufficient water, Justice Clifford held that the Government was, under 368
the charter, the agent of the owner and the underwriters were not liable for that order which had been given by the charterer.

I just refer to that as it seems to me, regardless of anything else in the case, on that decision the underwriters are not liable to the assured.

The Court: Have you any British case that holds the same way?

Mr. Mount: No, I haven't.

The Court: All right.

Mr. Mount: May I add this for your Honor's consideration? The libel is filed against underwriters for $902,000 with nine years' interest. It is not a light responsibility 369
to defend that claim.

The Court: Not a light responsibility to decide it either.

Mr. Mount: No, I agree. Underwriters and we ourselves have felt from the outset that it was so clearly beyond the termination of the insured voyage and beyond our coverage that they have, from the very first, denied liability and instructed us to defend.

And may I add that this is not a case where a solution might be for underwriters to pay and then pursue their subrogated rights. The libelant asks nine years' interest against us and in any suit against the Government there would be either the rule that interest applies only from the time of judgment, if it is in the Court of Claims, or on the

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value of the vessel when the Government requisitioned it, only four per cent from that time.

We feel that your Honor will be convinced that this loss of a vessel that was insured as a commercial vessel and was used as a war ship in an invading expedition was not covered either by the meaning and intent or by the words of the policy. We ask for a dismissal.

Mr. Murphy: And just before your Honor recesses, I would like to make two corrections. The first is, Mr. Mount has asked me to state that—I should qualify my remark that the libel against the United States would be withdrawn
371 if your Honor finds that there is a constructive total loss against the underwriters.

The Court: It won't be withdrawn. It will be dismissed.

Mr. Murphy: Except to this extent, your Honor: Mr. Mount wished me to state that he would insist on his right to maintain that suit as a subrogated underwriter, and I am very glad to make that correction. As far as Calmar is concerned, we are not interested in that suit except in so far as the underwriters may maintain the suit in the name of Calmar after they pay a constructive total loss.

There is one other slight correction I have to make, and then I am through. Mr. Mount called your Honor's atten-
372 tion to the *Williams* case. Your Honor asked if there was any decision in England to the same effect. Mr. Mount said there wasn't any. He is quite right in that. I simply want to call attention to what I think was an inadvertence. Mr. Mount said that in the *Williams* case the ship was under time charter to the United States. She was not. She was under a demise charter because the case says that the United States took the vessel into its possession and control, an absolutely distinguishable fact from the case at bar.

That is all I have to offer, your Honor.

The Court: All right. We will recess until a quarter after two.

(Recess to 2.15 p. m.)

AFTERNOON SESSION.

Mr. Murphy: At the outset, if the Court please, I move for a small amendment of the libel against the underwriters. It appears that on page 6 of that libel our stenographer, in copying out the clauses of the War Risk Policy, copied the rider, which was discussed this morning by Mr. Mount with the Court, at the very top of the page when it should have been at the bottom of the page. I simply want to amend the libel to move that paragraph at the top of the page down to the bottom of the page.

374 The Court: You mean the paragraph beginning, "Notwithstanding anything"——

Mr. Murphy: "else to the contrary contained in this policy, it is understood"——

The Court: And ending "capture, seizure and detention"?

Mr. Murphy: That is right.

The Court: You want to put that down at the bottom, that war risk clause, at the foot of the page?

Mr. Murphy: That is right.

Mr. Mount: No objection.

Your Honor, on that clause, I may have this morning said that we did not claim an ambiguity. What I should 375 say, and I would like to correct it, is that we think the clause is clear but obviously there is an ambiguity in view of the construction which the libelant puts upon it, and it is on that ground that we ask later to introduce evidence to explain the circumstances of the adoption of the clause in the insurance market.

The Court: I have indicated I will take that evidence.

Mr. Mount: Yes. I mean, I don't want——

The Court: But I won't pay any attention to it unless I myself find that it is ambiguous in its terms.

Mr. Mount: That is understood.

The Court: The mere fact that someone else claims another construction doesn't make it ambiguous.

Mr. Mount: That is understood. I simply wanted to clear up any statement I might have made this morning.

The Court: Yes, I understood your position, Mr. Mount.

Mr. Murphy: If the Court please, will it be stipulated that this action against Sydney Keith Scott is an action against all the individual Lloyds Underwriters named on the binder and the Lloyds policy?

Mr. Mount: That is stipulated. That is agreed to.

Mr. Murphy: I now beg leave to refer, for purposes of judicial notice, to certain documents which I will present to the Court and will not offer in evidence but will describe
377 briefly, so that the record will show what they are.

We shall ask the Court to take judicial notice of the historical facts surrounding the outbreak of the war with Japan and the developments thereafter as they affect the facts involved in this case.

The Court: On that aspect, wouldn't it be better for you gentlemen to prepare a schedule of dates and events, somewhat similar to what Mr. Mount has done in his trial brief? For instance, beginning on page 5, he gives me the date of the Japanese attack on Pearl Harbor, the Japanese attack on the Philippines. I don't recall that the dates of the Coral Sea engagement are narrated here.
378 If you feel it very important—nor do I notice that other dates are mentioned—I think that, perhaps, counsel could agree on an historical statement.

Mr. Murphy: We will endeavor to do that.

The Court: If you cannot, then I will have to do my own independent research.

Mr. Murphy: Will your Honor just let me mention these documents——

The Court: Yes.

Mr. Murphy: —and present them to the Court?

The Court: Yes.

Mr. Mount: May I—I beg your pardon—may I offer to all parties now a separate schedule of the *Portmar's* itinerary, if that is of any assistance to you, your Honor. It is practically what is in the brief.

Mr. Murphy: That is not the subject I am on.

The Court: Mr. Murphy wants me to take judicial notice of the historical chain of events.

Mr. Mount: Yes, but you did refer to our itinerary.

The Court: Because in your itinerary you also set forth historical facts which have nothing to do with the itinerary in and of itself.

Mr. Murphy: That is right, your Honor.

First, the 1943 World Almanac, pages 61 to 76 inclusive.

The Court: You are going to give those to me, Mr. Murphy?

380

Mr. Murphy: Yes, I will bring them all up together. I will just describe them now and leave them with your Honor.

Next, the New York Times, November 23, 1941, pages 1, 15 and 19.

Next, the New York Times of November 24, 1941, pages 1 and 6.

Next, a copy of Volume 3 of the History of the United States Naval Operations in World War II, by Samuel Eliot Morison, prepared under the cooperation of the United States Navy Department, Volume 3, entitled, "The Rising Sun in the Pacific," pages 64 to 79 inclusive, on the developments preceding Pearl Harbor, and pages 314 to 321 inclusive in the chapter entitled "The Prelude to the Invasion of Java," which relates many of the events with which the Court is concerned in this case.

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Next, a copy of the New York Times, October 13, 1950, which sets forth instalment No. 4 of Volume IV of the History of the Second World War by Winston Churchill, setting forth quotations and documents and events which are generally concerned in this case.

The Court: You call these to the Court's attention simply as a means that the Court may take of refreshing its recollection as to historical facts of which I should take judicial notice?

Mr. Murphy: Exactly, your Honor.

The Court: I will be glad to have other matters counsel for the underwriters or the Government desire to call to my attention. I will be glad to receive them because I am only going to take judicial notice of historical facts concerning which there is no dispute or issue.

Mr. Murphy: I would call Mr. Littleton Groom.

LITTLETON GROOM, called as a witness on behalf of the
383 libelant, being duly sworn, testified as follows:

Direct examination by Mr. Murphy:

Q. Where do you live, Mr. Groom? A. Princeton, New Jersey.

Q. Are you a member of the Bar? A. I am.

Q. Are you associated with the Calmar Steamship Corporation? A. I am.

Q. In what capacity? A. Vice-President.

Q. Were you employed by Calmar Steamship Corporation during the year 1942? A. I was.

Q. What was your position then? A. House counsel.

Q. Were you in a position close to the president of the
384 corporation at that time? A. Very close.

Q. How would you describe your relationship with the president of Calmar Steamship Corporation at that time? A. We had conferences frequently throughout the day; he would confer with me and I would confer with him on various matters in which Calmar Steamship Corporation was interested.

Q. Has Calmar Steamship Corporation an office and place of business within the City of New York? A. It has.

Q. Where? A. 25 Broadway.

Q. Who was the owner of the *Portmar* during the period beginning November 21, 1941, and ending November 17, 1942? A. Calmar Steamship Corporation.

Q. Have you in your files a statement of the particulars, dimensions and characteristics of the Steamship *Portmar*? A. I have. These are sister ships (indicating).

Q. You have handed me a paper on which certain particulars are shown with respect to four vessels, among them the *Portmar*. Does this column headed "*Portmar*" set forth your office record of the particulars of the *Portmar*? A. It does.

Mr. Murphy: It will shorten the testimony considerably if I may offer this in evidence as a summary of Mr. Groom's testimony. 386

Mr. Mount: No objection.

The Court: We are not concerned with the sister ships.

Mr. Murphy: No, sir. Only as a summary of Mr. Groom's testimony on the particulars of the *Portmar*.

The Court: The particulars are accepted in evidence as the witness' testimony but substitute, Mr. Murphy, just a statement of the ship involved in this suit so that we won't be confused with other data.

Mr. Murphy: That is right.

The Court: Do that sometime during the trial.

(Marked Libelant's Exhibit 1.) 387

Mr. Murphy: Off the record.

(Discussion off the record.)

Q. With what classification society was the *Portmar* classed? A. Lloyds.

Q. What was her classification? A. A-1.

The Court: Mr. Murphy, on this Exhibit No. 1 you have estimated cost of reproduction, date of estimate, January 19, 1944. Am I to disregard that date?

Mr. Murphy: Yes, your Honor. That does not bear on this case.

The Court: Let us have this typewritten then so as to include only the statistical data on the *Portmar*, leaving off the balance of it there, the estimated cost of reproduction, cost per ton, deadweight tons.

Mr. Murphy: Yes, your Honor.

Mr. Mount: Just the physical facts.

Mr. Murphy: That is right.

The Court: Mr. Murphy will have this typewritten.

Mr. Murphy: That's right.

389 Q. What was the speed of the *Portmar* on a consumption of fuel oil per day of 164 barrels? A. In excess of 9½ knots.

Q. Have you any certificate in your file bearing on the speed of the *Portmar*? A. We have.

Q. Will you produce it, please? A. (Hands paper to Mr. Murphy.)

Q. Will you tell the Court what that certificate is? A. This is a certificate that was issued by the American Bureau of Shipping at the request of War Shipping Administration, setting forth the speed of the *Portmar* computed on a formula devised by the War Shipping Administration, and
390 known as General Order 10, Supplement No. 2. Shows a speed of 10½ knots.

Q. Is that certificate dated April 25, 1944? A. It is.

Mr. Murphy: I offer that certificate in evidence.

(Marked Libelant's Exhibit 2.)

The Court: Is it conceded by all parties that this certificate represents the estimated speed of the vessel at the time involved in this suit here, in 1941?

Mr. Smith: It is not, your Honor. That is a formula computation for certain purposes of the War Shipping Administration, and I don't believe it necessarily reflects the actual speed of the vessel.

The Court: What weight can I give this, Mr. Murphy? The certificate is dated three years after the event complained of.

Mr. Murphy: It is a computation made by the Government as to the speed of the vessel, the *Portmar*, and the vessel doesn't change her speed.

The Court: I don't know whether it changed or not. According to the openings she underwent extensive repairs and alterations.

Mr. Murphy: This does not bear on the *Portmar* in her condition after the bombing. This is simply 392
a certificate of the speed of the *Portmar* as she was constructed and operated by the Calmar Steamship Corporation, and for purposes—may I ask?

Q. What was the purpose of this certificate? A. It was for two purposes, for calculation of charter hire under a later form of time charter, and for calculation of valuation for insurance purposes in the event she was insured by the Government, under those later time charters.

Q. At this time, of course, 1944, the *Portmar* was no longer in your possession; she had been requisitioned? A. That is right.

Q. This was a computation made for adjustment of 393
certain charter hires with respect to charters preceding the damage of the *Portmar* in this case? A. No, succeeding the damage of the *Portmar*.

Q. Was it made for the purpose of figuring and computing charter hire with respect to the *Portmar* during the period February 19 to November 17, 1942? A. Mr. Murphy, the War Shipping Administration was changing its mind and its orders so frequently, and making retroactive orders with respect to charter hire, that we had this certificate furnished by the American Bureau and then we furnished it to the War Shipping Administration. They never used it for the purpose of our charter hire or valuation.

394 Q. You had it prepared for retroactive purposes? A. In the event that the War Shipping Administration attempted to apply its retroactive orders to the *Portmar*.

Mr. Murphy: On that basis, then, I think——

The Court: There is no objection to it, so it has been received in evidence.

Q. In November 1941 was any charter made with the Maritime Commission was respect to the *Portmar*? A. Yes, sir.

395 Q. I show you a document and ask you what that is? A. That is a copy of a time charter, dated as of November 21, 1941, between Calmar Steamship Corporation, owner of the S.S. *Portmar*, and the United States Maritime Commission, covering the use of the *Portmar*—use of the space in the *Portmar* by the Government. It bore the Government contract number MCC1915.

Mr. Murphy: I offer the document in evidence.

If the Court please, this document was offered in evidence in connection with the master's testimony on July 31, 1945. It is marked Exhibit 1 for identification.

396 The Court: We will leave that alone. We will leave that notation on there.

Mr. Murphy: Is that the Court's pleasure, to leave that on there?

The Court: Leave that on there, and then we will put a new number on it.

(Marked Libelant's Exhibit 3.)

The Court: Leave the old notation on so we may relate it to the master's deposition.

Mr. Mount: Your Honor, of course, will note the charter party, not the characterization of it by the witness.

The Court: The witness is a lawyer, and I used to be a lawyer before I became a Judge.

Q. So far as you know, did Calmar Steamship Company perform each and all of the conditions on the part of Calmar to be performed under that charter?

Mr. Smith: I object to the question as calling for a conclusion.

The Court: It does call for a conclusion but it might save an awful lot of testimony——

Mr. Murphy: That is the idea.

The Court: —if you will let him answer, and then you may cross examine him.

Mr. Murphy: That is right. 398

Mr. Smith: It is a conclusion of one of the principal issues in the case between the charterer and the libelant.

The Court: Objection? Then it is sustained.

Mr. Murphy: I call the Court's attention—I will ask another question.

Q. I am asking you now, Mr. Groom, whether within your own knowledge, so far as you know, you know of any particular in which Calmar Steamship Corporation did not perform any condition on its part to be performed under that charter? A. I do not know of any. 399

Q. Who was the master of the *Portmar* during the period beginning November 21, 1941, and ending November 17, 1942? A. Captain Axel Michelson.

Q. How long had Captain Michelson been in the employ of Calmar Steamship Corporation prior to that time? A. Since 1927.

Q. Did the management of Calmar Steamship Corporation regard Captain Michelson as a competent shipmaster? A. A very competent shipmaster, Mr. Murphy. We wish we had more like him.

Q. At the beginning of this voyage, Mr. Groom, did Calmar Steamship Corporation take out war risk insurance on the hull of the *Portmar* for the proposed voyage pur-

400 suant to the provision of Article 2.17 of the charter, Libelant's Exhibit 3? A. May I look at it?

The Court: Do you have to look at it?

The Witness: I am confused whether it is 2.04 or 2.17.

(Exhibit handed to witness.)

A. (Continuing) It did.

Q. I show you what purports to be a slip or binder, issued on the heading of Thomas Stephens & Sons, Ltd.

401 Mr. Murphy: It has been stipulated, if the Court please, that this document is admissible in evidence.

Q. (Continuing) Will you look at that paper and tell us what it is?

The Court: Have all these papers that you are now showing the witness been stipulated to be introduced in evidence later?

Mr. Murphy: Yes.

The Court: Why don't you offer it in evidence now and get that over with? That might save time.

Mr. Murphy: At the Court's suggestion, I withdraw that, and I offer the following: I offer in evi-

402 dence stipulation between proctors for libelant and proctors for respondents, the underwriters, in action A. 133-332, describing certain documents annexed thereto. I offer the entire stipulation with the documents annexed thereto as one exhibit.

The Court: Do you want me to take this against the Government too?

Mr. Smith: I have no objection.

The Court: Received in evidence.

(Marked Libelant's Exhibit 4.)

The Court: And you may have photostats made for me.

Are those the original papers, Mr. Murphy?

Mr. Murphy: They are photostats, if the Court please. The originals——

The Court: You are going to give me a copy of this exhibit?

Mr. Murphy: Yes, sir.

The Court: All right.

Mr. Murphy: We will give your Honor the original. We will give your Honor this exhibit.

While we are on this subject, if the Court please, I also offer a further stipulation made between proctors for libelant and proctors for the respondent 404
underwriters in A. 133-332, this stipulation having annexed to it certain documents not recited in the stipulation, and which I will identify now: Photostat of letter from Thomas Stephens & Sons, Ltd. to Messrs. Mather & Company of Philadelphia, dated February 6, 1942.

Next, photostat of cable sent by Mather, Ltd. to Thomas Stephens & Sons of London, dated April 7, 1942.

Next, photostat of cable sent by Thomas Stephens & Sons, Ltd. to Messrs. Mather of Philadelphia, dated April 8, 1942.

Next, photostat of cable sent by Thomas Stephens 405
& Sons, Ltd. to Messrs. Mather of Philadelphia, dated April 9, 1942.

Next, certified copy of the judgment of the High Court of Australia in Admiralty between United Salvage Proprietary, Ltd. and John Protheroe Williams, plaintiffs, and the Ship *Portmar*, defendant.

Mr. Mount: Do you want to add, for the sum of 5000 pounds?

Mr. Murphy: Yes, for the sum of 5000 pounds and costs, dated November 19, 1943, with certified copy of satisfaction of that judgment signed by one Francis Gregory Murphy at Melbourne, March 24,

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1950. It is stated that Mr. Murphy was managing law clerk in the employ of the solicitors for the plaintiffs in the salvage suit, acknowledging satisfaction of the judgment. Both documents certified and authenticated.

Mr. Mount: In the sum of—put that in.

Mr. Murphy: Satisfaction?

Mr. Mount: Satisfaction.

Mr. Murphy: In the total sum of 6,156 pounds, 9 shillings 9 pence, being made up of salvage judgment of 5,000 pounds, costs taxed 1,156 pounds 9 shillings and 9 pence, less 500 pounds already paid into court by solicitors for the *Portmar*.

407

The Court: Does the Government consent that this be received in evidence?

Mr. Smith: No objection.

Mr. Mount: No objection.

(Marked Libelant's Exhibit 5.)

Q. I show you three documents and ask you what they are. A. Those are the policies of war risk insurance issued by the underwriters to cover the SS. *Portmar*.

408 Q. On the voyage—— A. On the voyage to the Philippines and return to North Atlantic port.

Mr. Murphy: I offer the original policies in evidence, the first being Lloyds policy as Libelant's Exhibit 6.

(Marked Libelant's Exhibit 6.)

Mr. Murphy: The next policy is the policy of the Institute of London Underwriters.

(Marked Libelant's Exhibit 7.)

Mr. Murphy: And the next is the policy of Excess Insurance Company, Ltd.

(Marked Libelant's Exhibit 8.)

The Court: You substitute photostats. I don't like to have original papers left with me.

Mr. Murphy: Does the Court wish us to send these photostats right away or when we submit?

The Court: When you submit your briefs. Do it whenever it is convenient to yourselves, but at least have them in when you submit your briefs. I don't like to keep too many original papers.

Mr. Mount: Would it aid the Court if we stipulated that the three policies are in the same terms and conditions, merely different underwriters? 410

The Court: They are identical in form and differ in substance only as to the underwriters and the amounts?

Mr. Murphy: Right.

The Court: So then send me up one—better send the three up.

Mr. Mount: You need only look at one.

The Court: No, we will use the three of them.

Mr. Murphy: If the Court please, I have to put in a couple of other policies which do not relate to Mr. Mount's client—perhaps one does—but which——

411

Mr. Mount: No, I don't see why those are relevant in this case.

The Court: Let me hear what he wants to say first, Mr. Mount, and I may agree with you. What policies do you want to put in?

Mr. Murphy: These are the other policies taken out pursuant to clause 2.17 of its charter.

The Court: What is that, marine risks?

Mr. Murphy: No, war risk protection and indemnity, covering the repatriation expenses of the crew, the insurance on their lives for death and bodily injury, the insurance on the slop chest, and the insurance of——

412 Mr. Mount: Personal effects.

Mr. Murphy: On the claim against the United States, that is to say, if the events——

The Court: You mean they would be included in the charter hire?

Mr. Murphy: No.

Mr. Smith: We say the premium payable under them is deductible from the charter hire. We think they are relevant.

The Court: Why put the policies in? Why don't you just stipulate as to the nature of the policy
413 and as to the amount? Wouldn't that be simpler?

Mr. Murphy: It would be a good suggestion, if the Court please, but it might be quicker to have them marked.

The Court: Quicker for you, but it will be more difficult for me. If I have a tabulated schedule that this insurance cost so much; and that insurance cost so much, and you introduce it all set forth on a schedule, I won't have to go rummaging through five or six policies if and when the time comes. Prepare a schedule showing the nature of the insurance, the date it was issued, and the amount of premium. Put
414 it all on one schedule.

Mr. Smith: And the amount paid under the policies.

Mr. Mount: With the statement that they are relevant only as between Calmar and the Government.

The Court: They have nothing to do with the case.

Mr. Murphy: They have nothing to do with your clients. They have nothing to do with the respondents in this suit.

Mr. Mount: Right.

The Court: We understand.

By Mr. Murphy:

Q. After the insurance was arranged, Mr. Groom, did Calmar Steamship Corporation inform the United States Maritime Commission of the nature and terms of the insurance which had been taken out? A. It did.

Q. I show you a photostat of a letter and ask you what that is. A. That is a letter dated November 26, 1941, from Calmar Steamship Corporation, signed by Mr. H. W. Warley, addressed to Mr. B. K. Ogden, Director, Division of Insurance, U. S. Maritime Commission, describing the insurance placed, the amounts, the companies with which placed 416
—underwriters—the coverage and the premium.

Mr. Murphy: I offer that letter in evidence.

The Witness: When I said coverage, I meant amount of coverage, amount of insurance.

Mr. Mount: May I ask one question about this?

Mr. Murphy: Go right ahead.

Preliminary cross examination by Mr. Mount:

Q. Mr. Groom, I noticed in the first paragraph of this letter it refers to the various forms of war risk insurance for charterer's account. By that did you mean for the 417
financial account of the charterer, that is, at his expense? A. That is right, the premium——

Mr. Smith: I object to that question, if your Honor please. I don't think this witness can interpret the letter.

The Court: Yes, the letter will have to speak for itself.

Mr. Smith: He didn't write it.

The Court: The objection is sustained. In fact, this witness's description of the contents of a letter should not be in evidence at all. Simply offer the letter in evidence. I can read it.

418 Mr. Murphy: I offer in evidence photostat of a letter from Calmar Steamship Corporation, signed by H. W. Warley, President, to B. K. Ogden, Director, Division of Insurance, United States Maritime Commission, Washington, D. C., dated November 26, 1941, entitled "SS. *Portmar*, Voyage 398."

(Marked Libelant's Exhibit 9.)

The Court: Give Mr. Mount a copy and Mr. Smith a copy.

419 *Direct examination resumed by Mr. Murphy:*

Q. Mr. Groom, did the Maritime Commission subsequently write to Calmar Steamship Corporation with respect to the insurance described in the letter which has just been offered in evidence and marked Libelant's Exhibit 9? A. It did.

Q. Have you the letter from the Maritime Commission? A. (Hands paper to Mr. Murphy.)

Mr. Murphy: I offer in evidence letter from the United States Maritime Commission to Calmar Steamship Corporation, dated February 20, 1942, referring to the *Portmar*, as Libelant's Exhibit 10.

420

(Marked Libelant's Exhibit 10.)

Q. I show you a document and ask you what that is. A. Photostatic copy of the Shipping Articles, covering the voyage of the *Portmar*.

Mr. Murphy: I offer that in evidence as bearing on the rates of wages and as relating to the expenditures made by Calmar with respect to wages of the crew during repatriation and kindred matters.

The Court: This concerns your possible claim against the Government?

Mr. Murphy: Yes, your Honor. This does not relate to the action——

The Court: Does not relate to the underwriters at all?

Mr. Murphy: That is right, your Honor.

(Marked Libelant's Exhibit 11.)

Q. Mr. Groom, when did the *Portmar* sail on the voyage provided in the charter? A. November 28, 1941.

Q. From what port? A. Port of San Francisco.

Q. Did you receive any word from the vessel of any 422 kind or concerning the vessel prior to the Japanese attack on Pearl Harbor? A. We did not.

Q. After the attack on Pearl Harbor did you receive——

The Court: Suppose you refer to dates, Mr. Murphy, rather than to events.

Mr. Murphy: All right.

Q. When I refer to the attack on Pearl Harbor, I meant on December 7, 1941. A. We did not.

Q. After December 7, 1941, did you receive any word from the vessel immediately? A. No, sir.

Q. Did you make any effort to trace the vessel and ascer- 423 tain what she was doing and where she was? A. Yes, sir, we did.

Q. What did you do? A. We had Mr. Usher, our vice-president in San Francisco, inquire of the Navy. He wrote us back on or about December 31 that the Navy had no information. We inquired of the Navy Department in Washington, near the end of December, and were told that the vessel was safely afloat.

Q. When did you first learn that the *Portmar* did not go to the Philippine Islands? A. Officially or unofficially, Mr. Murphy?

Q. In any way. A. We learned unofficially somewhere near the middle of January. I believe it was the 17th or

19th of January. On the 17th of January one of our employees at the office called Mr. Hunter of Lavino & Company, who supplied Bethlehem with a large amount of ore with respect——

Q. Just stop there a minute. Let me interrupt you a minute. You mentioned the name of Bethlehem. Do you mean by that Bethlehem Steel Corporation? A. Bethlehem Steel Company.

Q. Will you tell the Court what the relationship between Calmar Steamship Corporation and Bethlehem Steel Company is? A. Bethlehem Steel Company and Calmar Steamship Corporation are 100 per cent subsidiaries—the capital stock is 100 per cent owned by Bethlehem Steel Corporation. So Bethlehem Steel Company and Calmar Steamship Company are affiliates.

425

Q. When you said that Lavino supplied ore to Bethlehem Steel Company, you mean ore for use in the activities of the steel business? A. Right.

Q. Go ahead then. Carry on from there. A. He inquired of Mr. Hunter respecting a cargo of ore that Bethlehem was expecting. Our office handled the ocean transportation of all such cargoes. And in the course of the conversation Mr. Hunter told him that the SS. *Portmar* was going to load a cargo of chrome ore at New Caledonia for Lavino for discharge at Philadelphia; that the vessel would be under the agency of Vic Freeze.

426

Q. Who is Mr. Freeze—F-r-e-e-z-e, is that right? A. That is correct.

Q. Who is he? A. At that time he was traffic manager of United States Lines. He is now vice-president of United States Lines. We were unable——

Q. Mr. Freeze of U. S. Lines was to be the homeward agent for the Maritime Commission on this charter, is that correct? A. That is correct. And that day, that was Saturday, we could not get hold of Mr. Freeze, so we got hold of him on Monday and then for the first time we

learned that the vessel was in Australia. He said that the vessel was in Australia, he didn't know what port, and confirmed what Mr. Hunter had told us, that she was to load a cargo of chrome the latter part of February for discharge at Philadelphia about the middle of April.

Q. Did I understand you to say that Mr. Freeze said that the *Portmar* was in Australia somewhere? A. That is correct.

Q. Is that the first information you had of where the vessel was at that time? A. That is correct, and that was unofficial. 428

Q. Did you receive any other information as to the movements of the *Portmar*? A. Then a couple of days later we received a teletype from Mr. Usher, of our San Francisco office, which stated that "Michelson, Darwin, January 19."

Q. Will you interpret that for us? A. Michelson is the captain of the *Portmar*, and he meant that the SS. *Portmar* was at Port Darwin, Australia, on January 19th.

Q. Was it usual in those days to identify vessels just by the names of masters? A. Oh, yes.

Q. On receipt of that teletype message from your San Francisco office what did you do? A. That teletype was received late on the 22nd of January. On the 23rd we 429 considered it at a conference in our office, and conferred with our attorneys, and decided that while it probably wasn't necessary, it wouldn't be—it might be advisable to send a cable to the underwriters.

Q. I show you a cable attached to the stipulation Libelant's Exhibit No. 4 and ask you if that is the cable which you requested Mather to send? A. Yes, we acted through our brokers, Mather & Company.

Q. I meant to ask you that. Who were your brokers in arranging this insurance? A. Mather & Company.

Q. Of Walnut Street, Philadelphia? A. Yes.

430 Q. Did you request Mather to send that message? A. We did.

Q. The name of Thomas Stephens & Sons, Ltd. appears in the papers quite frequently here. Who were they? A. They were Mather & Company's correspondents in London.

Mr. Murphy: I ask the Court at this point to note that this cable bears many initials, it is the cable received by Stephens from Mather, and I don't think it will be disputed that those are the initials of the several underwriters interested in this claim.

431 Mr. Mount: We agree to that.

The Court: It is not disputed?

Mr. Mount: Not disputed.

The Court: That this cable came to the attention of the underwriters?

Mr. Mount: Shown to the underwriters and initialed by them.

Q. Did Messrs. Mather subsequently report to you that that cable of January 24th had been submitted to the underwriters and had been agreed to?

Mr. Mount: I object to the form of that question.

432 Let the letter from Stephens speak for itself.

The Court: Objection sustained.

Mr. Murphy: Very well. I will withdraw the question altogether. The exhibit will speak for itself.

Q. Mr. Groom, when did Calmar Steamship Corporation first learn that the *Portmar* did not go to the Philippine Islands as provided in the charter by reason of government orders? A. May 1 or 2, 1942.

Q. I show you a cable, which has already been marked Libelant's Exhibit 15 for identification, and ask you if that cable was received by your office? A. It was.

Q. Does it refresh your recollection? A. Well, this tells us, Mr. Murphy——

The Court: No, does it refresh your recollection? Yes or no.

The Witness: Not on the question asked, no, sir.

Q. Then I will ask this question: When did you first know that the *Portmar* had been diverted to Suva in the Fijis? A. April 1st, 1942.

Q. Is that the cable which gave you that information (indicating)? A. That is the cable. 434

Mr. Murphy: I offer the cable in evidence, cable from Captain Axel Michelson to Calmar Steamship Corporation, dated Melbourne, April 1, 1942.

(Marked Libelant's Exhibit 12.)

(Short recess.)

By Mr. Murphy:

Q. Mr. Groom, in your cable of January 24, 1942, which is contained in Libelant's Exhibit 4, in the cable which you requested Mather to send, which was sent to Stephens on January 24, 1942, the words appear, "*Portmar* diverted to Australia on outward voyage on Government orders." 435 What information did you have at that time about Government orders? A. We didn't have any, Mr. Murphy. We knew our captain; we knew that he would not have gone to Australia except for Government orders.

Q. Did Calmar Steamship Corporation ever receive two letters written by Captain Michelson and sent by him from Suva, Fijis, on or about December 20, 1941? A. No, sir.

Q. What was the first official notice that Calmar Steamship Corporation had respecting the movements of the *Portmar* after Pearl Harbor, after December 7, 1941? A. That was a letter dated February 18, 1942, which we

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received on February 19, 1942, from the Maritime Commission.

Q. Have you that letter in your file? A. No, sir, one of our files is lost or missing and the letter was in that file.

Q. Do you remember what was in that letter? A. I remember that the letter stated that the *Portmar* arrived Darwin February 12th.

Mr. Murphy: Has Government counsel a copy of that letter, by any chance?

Mr. Smith: We haven't.

437

Q. Did you receive any further word as to the movements of the *Portmar* after that letter from the Maritime Commission which you received on or about February 19, 1942? A. We received a telegram from Mr. I. M. Holt of the Maritime Commission on or about February 24th.

Q. Is that the telegram you received (indicating)? A. It is.

Mr. Murphy: I offer it in evidence. This is a telegram from I. M. Holt, War Shipping Administration, to Calmar Steamship Corporation, dated Washington, February 23, 1942.

438

(Marked Libelant's Exhibit 13.)

Q. What is the first word you received from the master of the *Portmar* concerning the movements of the vessel after Pearl Harbor, December 7, 1941? A. We received two telegrams, Mr. Murphy. As I recall, one was dated March 23 and one was dated March 24, both from Melbourne, one with respect to the crew and one with respect to the vessel.

Q. I show you one cable dated March 24 from Captain Michelson to your company. Is that one of those telegrams? A. That is.

Q. I show you another one, dated March 30. Is that the other one or have you another one in mind? A. I have another one in mind.

439

Mr. Murphy: I offer the cable of March 24 in evidence.

Mr. Smith: No objection.

(Marked Libelant's Exhibit 14.)

Q. I show you cable dated April 6, 1942, and ask if that is the other cable you had in mind? A. No, sir.

Mr. Murphy: I offer this cable dated March 23, 1942, in evidence.

Mr. Smith: No objection.

440

(Marked Libelant's Exhibit 15.)

Q. Did you send an answer to Captain Michelson's cable of March 24th? A. We did.

Q. Is that the answer you sent (indicating)? A. It is.

Mr. Murphy: I offer it in evidence.

These have all been seen a dozen times by all counsel.

The Court: They like to look at them again, perhaps to refresh their recollection. Maybe they think they are favorable to them.

Mr. Smith: No objection.

441

(Marked Libelant's Exhibit 16.)

Q. I show you cable from Malleson, Stewart & Company, solicitors, Melbourne, to Calmar-Bethlehem Steel Corporation, dated March 30, and ask you if you received that cable? A. We did.

Mr. Murphy: I offer it in evidence.

Mr. Smith: No objection.

(Marked Libelant's Exhibit 17.)

Q. I show you letter from the United States Maritime Commission to Mr. H. W. Warley, President, this letter

being signed by J. E. Outler, Chief, Ship Control Section, dated April 3, 1942, and ask you if you received that letter? A. Yes, we did.

Mr. Murphy: I offer it in evidence.
Mr. Smith: No objection.

(Marked Libelant's Exhibit 18.)

Q. After receipt of these communications, Mr. Groom, did Calmar Steamship Corporation take any action with respect to the war risk underwriters on the *Portmar*?
443 A. Yes, sir.

Q. What did you do? A. Through Mather & Company we tendered abandonment of the *Portmar* as a constructive total loss.

Q. I show you a cablegram of April 7, 1942, from Mather, Co. to Thomas Stephens & Sons, London, annexed to stipulation, Libelant's Exhibit 5, and ask you if that cable was sent at your request? A. Yes, sir.

Q. I show you the next cable from Stephens to Mather, dated April 8, 1942, and ask if Mather reported receipt of that cable to you? A. Yes, sir.

Q. And now the next document attached to the stipula-
444 tion, Libelant's Exhibit 5, is a photostat of a cable from Thomas Stephens to Mather, dated April 9, 1942. Did Mather report receipt of that cable to you? A. Yes, sir.

Q. Did you inform Malleson, Stewart & Company, Melbourne, as to the action you were taking with respect to the *Portmar* and the Underwriters? A. Yes, sir.

Q. Is this the cable you sent to Malleson, Stewart, dated April 7, 1942? A. Yes, sir.

Mr. Murphy: I offer the cable in evidence.
Mr. Smith: No objection.

(Marked Libelant's Exhibit 19.)

Q. I show you photostat of letter dated April 8, 1942, from Thomas Stephens & Sons, Ltd. to the companies on

combined policy No. D41/11,356, and another letter from Thomas Stephens & Sons, Ltd. to underwriters on policy No. D41/11,356 at Lloyds, these letters bearing certain initials and notations attached, all being attached to the stipulation, Libelant's Exhibit 4.

Did the Calmar Steamship Corporation subsequently receive those copies of those letters from Mather & Company? A. Yes, sir.

Mr. Murphy: Here again, Mr. Mount, I take it that it is stipulated that the notations and initials on these letters are those of the underwriters named on 446 the policies?

Mr. Mount: I agree those are the initials of the underwriters.

Q. There is also attached to the stipulation Libelant's Exhibit 4 a photostat of a letter from the Excess Insurance Company, Ltd. to Thomas Stephens & Sons, Ltd., dated April 9, 1942. Did Calmar Steamship Corporation subsequently receive a copy of that letter from Mather & Company? A. Yes, we did.

Q. Did Calmar Steamship Corporation later receive a copy of a communication from Thomas Stephens & Sons to Mather, Ltd. in January 1943? A. Yes, sir. 447

Q. I show you photostat copy of a letter dated January 8, 1943, from Thomas Stephens & Sons, Ltd. to Messrs. Mather & Company, Philadelphia, annexed to stipulation Libelant's Exhibit 4. Is that the photostat of the letter to which you referred? A. Yes, it is.

Mr. Murphy: If the Court please, I have here a group of cables exchanged between Calmar Steamship Corporation and the master of the *Portmar* in Melbourne, beginning with April 6, 1942, and ending March 3, 1943. They have all been offered in connection with the testimony of Captain Michelson, and it will save time if we can put them in.

448 *Littleton Groom, for Libelant—Direct.*

The Court: If it is conceded that these are original cables exchanged between the captain and the steamship owners, mark it as one exhibit.

Mr. Mount: If Mr. Murphy tells us so, that is good enough.

The Court: Mark them as one exhibit.

Mr. Murphy: I think they are familiar to all counsel.

(19 cables and one handwritten letter marked Libelant's Exhibit 20.)

449

Q. Was Calmar Steamship Corporation informed during the summer of 1942 that The Commonwealth Salvage Board had made a claim for salvage award against the *Portmar* in the sum of 100,000 pounds? A. Yes, sir.

Q. And were you also informed that United Salvage Proprietary, Ltd. and John Protheroe Williams had asserted a claim of 50,000 pounds Australian? A. We were.

Q. I show you a letter from the War Shipping Administration to Calmar Steamship Corporation, dated October 24, 1942. Did you receive that letter? A. We did.

Mr. Murphy: I offer it in evidence.

450 Mr. Mount: I have no objection. Will you let me have a copy of that particular one?

Mr. Murphy: Surely. I thought you already had one.

Mr. Mount: No, I haven't.

Mr. Smith: No objection.

Mr. Murphy: I offer it in evidence.

(Marked Libelant's Exhibit 21.)

Q. I show you a telegram from W. C. Peet, Jr., Secretary of the United States Maritime Commission, to Calmar Steamship Corporation, dated November 12, 1942, and ask you if your company received that telegram? A. Yes, we received it.

Mr. Murphy: I ask that that telegram be marked in evidence.

(Marked Libelant's Exhibit 22.)

Mr. Murphy: If the Court please, I have here what purports to be the original requisition certificate of the *Portmar*, dated Brisbane, Queensland, Australia, November 17, 1942, and ask if it is stipulated that the copy of it which is attached to Libelant's Exhibit 22 may be marked in evidence in lieu of the original requisition certificate? 452

Mr. Mount: Yes.

Mr. Smith: Yes.

Mr. Murphy: I offer in evidence the copy attached to Libelant's Exhibit 22 as Libelant's Exhibit 23.

(Marked Libelant's Exhibit 23.)

Mr. Mount: All one exhibit?

Mr. Murphy: No.

The Court: The requisition is 23.

Q. Mr. Groom, referring to the first cause of action of the libel of Calmar Steamship Corporation against the United States, in which the libelant claims charter hire with respect to the *Portmar* for the period February 18, 1942, to noon November 17, 1942, Eastern Australian Time, have you computed the amount of charter hire which Calmar Steamship Corporation contends that it is entitled to recover from the United States? A. Yes, sir. 453

Q. Will you state the claim? A. Charter hire, $360,026.71, in addition to feeding of——

The Court: Wait a minute. That is from what date to what date?

The Witness: February 20, 1942 to November 17, 1942.

The Court: Why do you pick out February——

454 *Littleton Groom, for Libelant—Direct.*

The Witness: February 19. That was the date the vessel was damaged in Port Darwin.

The Court: And what is the terminal date?

The Witness: November 17, the date she was requisitioned.

Mr. Murphy: The date requisitioned for title.

The Court: Have you been paid any part of that charter hire?

The Witness: We were paid, your Honor, for the balance of the month of February, and then it was
455 taken back from us on charter hire that was owed on another ship.

The Court: An adjustment?

The Witness: An adjustment.

The Court: So that you haven't been paid for that period of time?

The Witness: That is right.

The Court: The Government disputes your claim. Have you billed for that?

The Witness: No, sir.

Mr. Murphy: We have sued for it.

The Court: You have sued for it? You have made
456 demand?

Mr. Murphy: We have made demand.

Q. There is one other item. What is that item? A. Feeding of three passengers, three supercargoes, from November 28, 1941 to January 19, 1942. Amounts to $238.50, making a total claim of $360,265.21.

Mr. Murphy: I have here, if the Court please, a computation of the charter claim with the adjustment document attached to it which, in order to illustrate the testimony, may be offered simply so that there will be a written record of how it is figured.

The Court: Show it to Mr. Smith.

Mr. Smith: I don't concede its relevancy but I have no objection to its being in for the purpose of the Court's convenience.

The Court: It is simply a graphic——

Mr. Murphy: That is all.

The Court: —representation of the claims made.

Mr. Murphy: That is right.

The Court: It may be convenient for me to look at this instead of digging through the testimony.

(Marked Libelant's Exhibit 24.)

458

Q. As to the expenses, did Calmar Steamship Corporation incur any expenses as a result of the damage sustained by the *Portmar*? A. Yes, sir.

Q. Will you describe what they were? A. It incurred expenses in respect of salvage, in respect of repatriation of the crew and in respect of sue and labor.

Q. Take up the salvage first.

The Court: Have you a list of those expenses?

Mr. Murphy: Yes, sir, it is all written down.

The Court: Did you pay out that money?

The Witness: We did.

The Court: You feel they were just and reasonable expenses necessarily incurred? 459

The Witness: Yes, sir.

The Court: Any objection to receiving the statement in lieu of his testimony?

Mr. Smith: No.

Mr. Mount: No objection to the statement. I would like to look over the items.

The Court: Yes. I mean, you are not conceding they are legitimate charges but you are simply conceding that libelant would offer testimony as to the reasonableness of these disbursements and as to the fact that they were made.

460

Mr. Mount: If Mr. Groom says they were made, that is sufficient for us.

(Marked Libelant's Exhibit 25.)

Q. Mr. Groom, looking at this schedule, it comes to a total sum of $27,322.35. Am I right in that? A. No, sir.

Q. Oh, yes, tell me— A. $63,000.

Q. $63,764.26, and I think you said that is made up of salvage, sue and labor, and repatriation. Will you break that down for us and tell us how much is attributable to salvage, and the legal expenses attached to that, and how much is sue and labor, and how much is repatriation of the crew? A. To salvage and legal expenses in connection with it, $20,008.59.

461

Q. That is salvage award and costs? A. Right.

Q. No legal fees in that? A. No, that is right.

Q. Now, next, what about the legal fees in the defense of the salvage action? A. Legal fees and disbursements, $7,313.76.

Q. Are those the total legal fees paid to Malleson, Stewart, including the defense of the salvage action? A. Right.

Q. What other sue and labor items have you? A. We have the masters' wages, his expenses, the subsistence, cablegrams, and we have a survey fee.

462

The Court: They are all itemized here?

Mr. Murphy: Yes.

Q. Just let us have the total of the sue and labor expenses, outside of the salvage you have just given us. A. Including the $7,313 figure I have just given you, the total is $17,940.34.

Q. What is the total of the expenses incurred in the repatriation of the master and the crew? A. $17,835.96.

The Court: We will adjourn now until 10.15 tomorrow morning.

(Adjourned to January 19, 1951, at 10.15 a. m.)

New York, January 19, 1951;
10:15 a. m.

TRIAL RESUMED.

LITTLETON GROOM, resumed the stand.

Mr. Murphy: While we are waiting for Mr. Mount, if the Court please, there is one formality that I might accomplish. I think Mr. Hall can represent Mr. Mount just for the purpose of my substituting a rewrite of Exhibit 1 pursuant to the direction of the Court. 464

The Court: Yes, that was statistical information concerning the ship? Yes, all right.

Direct examination continued by Mr. Murphy:

Q. Mr. Groom, have you prepared a revision of Libelant's Exhibit 1 pursuant to the direction of the Court yesterday? A. I have.

Mr. Murphy: I offer it in evidence and ask that it be substituted for the exhibit which was presented yesterday. 465

The Court: That is, Libelant's Exhibit No. 1.

Mr. Hall: That is all right.

(Marked Libelant's Exhibit 1.)

(Mr. Mount entered the courtroom.)

Mr. Mount: By approval, I would like to show your Honor a chart, just so that you may see the area in which these things happened.

The Court: I thought, if you could agree on it, you might take that chart and trace on it the course of the voyage and, during the course of the voyage,

designate certain dates which are of particular importance. For instance, if you determine where the ship was on December 7, 1941, that might be important. If you can determine the date that it received the radio to change its course, that might be another important point. The date that it went to Sydney; the date that it went first to Darwin, and went to Brisbane; then when it went on to Timor Island, and when it came back, and the date it was finally towed into—where was it towed into, into Brisbane?

Mr. Murphy: Into Brisbane.

The Court: (Continuing) If you could pick out those dates and agree on those dates among yourselves, and trace the course of the ship, showing the location of the ship on those dates, it would be more helpful than the bare chart itself.

Mr. Mount: My only thought was your Honor would see the three points, Darwin, Wyndham and Koepang.

The Court: I would be glad to use it now but I thought, before we finished the case, we might put in on the chart—we won't mark this chart in evidence—let the chart be marked for identification—showing the course of the ship or the location of the ship on these dates that we feel are or may be of importance.

Mr. Mount: This is a Geodetic Survey chart.

The Court: Thanks very much. In fact, I think I spoke to Mr. Murphy or Mr. Smith about this yesterday.

Mr. Murphy: Yes; your Honor did.

The Court: I think I know how to read the chart. This you don't have to put on the record.

(Discussion off the record.)

By Mr. Murphy:

Q. Mr. Groom, when did the Calmar Steamship Corporation first learn that the *Portmar* had been diverted by United States Navy orders to Suva in the Fiji Islands? A. That was the question I was answering yesterday, Mr. Murphy; about May 1st or 2nd, 1942.

Q. What happened on May 1st or 2nd, 1942, which gave you that information? A. The first officer and the crew returned to the United States and arrived in San Francisco about that time.

Q. Prior to that date Calmar Steamship Corporation 470
had word that she had been diverted, is that right? A. Yes, we had that telegram which was put in evidence yesterday of April 1st, from the captain, but that didn't say on whose orders. It just said, "Diverted."

Q. During all the events that occurred with respect to the *Portmar* from the time she left San Francisco, on November 28, 1941, and until she was towed to Brisbane and arrived at Brisbane on July 27th or thereabouts, 1942, did Calmar Steamship Corporation have any knowledge or information as to what was going on at the time it happened? A. Oh, no, Mr. Murphy. It was days and weeks, sometimes months, after the event before we knew about it. 471

Q. Of course, you had no prior information as to what was going to happen? A. No.

Q. What was the intent of the management of Calmar Steamship Corporation with respect to the *Portmar* and with respect to the voyage called for by the charter involved in this case? A. It was to carry out the terms of the charter and complete the round voyage.

Q. What was the ultimate port of destination of the *Portmar* on that round voyage? A. It was to a port or ports on the North Atlantic, north of Cape Hatteras.

Q. What was the port of registry of the *Portmar*? A. New York.

472 *Littleton Groom, for Libelant—Cross.*

Q. In what State was Calmar Steamship Corporation incorporated? A. It was and still is incorporated in the State of Delaware.

Mr. Murphy: Your witness, Mr. Mount.

The Court: We decided the Government should go next.

Mr. Murphy: Pardon me.

The Court: And then Mr. Mount will follow Mr. Smith.

473 *Cross examination by Mr. Smith:*

Q. Mr. Groom, did Calmar Steamship Corporation or anyone acting on behalf of Calmar Steamship Corporation make any effort to regain possession of the *Portmar* or to repair her after you received notice that she was stranded? A. We didn't know anything about it; the full situation, Mr. Smith——

Q. I think that can be answered yes or no? Did you? A. No.

Q. On direct examination you testified to various expenditures made by Calmar Steamship Corporation with respect to expenses after the beaching and stranding of the
474 *Portmar* on February 19th. Are all of those expenses included in claims which Calmar Steamship Corporation has made against its various underwriters? A. That is right.

Q. And is there any arrangement with respect to those claims and their ultimate disposition between Calmar Steamship Company and the underwriters? A. Not at all.

Q. Are any of those claims time barred at the present time? A. As far as I know, no.

Q. Will you tell me how you are sure of that fact?

The Court: Time barred with reference to the underwriters?

Mr. Smith: Underwriters, that is right.

A. Well, on certain of these items, Mr. Smith, for example, the repatriation, the claim for death of the seamen, slop chest, personal effects, there is an arrangement with the underwriters that they will abide the result of this main suit on the hull.

Q. But there is an arrangement of that nature? A. Oh, yes, there is an agreement, verbal.

Q. In addition to the expenses which form part of the Calmar Steamship Corporation's claim against various underwriters, did Calmar Steamship Corporation incur any expenses whatsoever of the sort normally incurred as 476
owner's expenses in the operation of the vessel pursuant to this charter after the *Portmar* stranded on February 19th? A. Other than those stated in the exhibit presented yesterday, no.

Mr. Smith: That is all.

Mr. Murphy: Will the Court bear with me a moment? I wish to ask the reporter if he will read to me the first question on cross-examination.

(Record read.)

Cross examination by Mr. Hall: 477

Q. Mr. Groom, was the charter party for the voyage of the Portmar, that is, Exhibit 3 here, negotiated in New York? A. We were told, Mr. Hall, that we would have—the vessel would be taken under a certain form of time charter, known as PR 970—that is also known as Columbian form of time charter—and in our telegram to the Maritime Commission we said that that was satisfactory.

Q. And the form of charter was then prepared by the Maritime Commission, wasn't it? A. Oh, yes, yes.

Q. You had no say about it? A. It was presented to us and we made one or two changes. One, as I recall, was that the port of redelivery was to be a port on the North Atlantic, north of Cape Hatteras. That was pursuant to

the telegram which we received from the Maritime Commission requiring that we deliver the vessel—or, requesting that we deliver the vessel to it.

Q. All the terms, particularly in part 2 of the charter party were prepared by the Government and given to you in that form to accept, is that correct? A. That is right.

Q. But you knew or were fully aware of the provisions of the charter party before the vessel ever sailed on this voyage from San Francisco? A. In general, yes, because we knew the form of PR 970 time charter. The time charter
479 was not actually executed until after the vessel had sailed.

Q. What orders did Calmar give to Captain Michelson regarding the voyage to the Philippines under this charter party? A. We gave him a copy of the proposed charter and instructed him to carry out the usual orders that were contained in circular letters aboard ship.

Q. Did you tell him to take his sailing directions from the Government? A. We did not.

Q. Did you ever give him any sailing directions? A. We did not.

Q. All the sailing directions that were received by Captain Michelson were received from the Government, weren't
480 they, from the time the vessel sailed from San Francisco? A. He so testified.

Q. Do you know anything to the contrary? A. No, sir.

Q. Had the *Portmar* always been used by the Calmar Steamship Corporation as a merchant vessel? A. It had.

Q. How long had the *Portmar* been owned by the libelant? A. We acquired her in 1930.

Q. At the time she sailed from San Francisco on November 28, 1941, was she armed? A. No, sir.

Q. No guns on her at all, that is, as part of the ship's equipment? A. No, sir.

Q. She sailed as a merchant vessel from San Francisco, is that correct? A. That is right.

Q. Are we to assume that all that you knew in New York about the condition of the *Portmar* on April 7th or

April 8, 1942, is contained in the various exhibits that were put in evidence here, particularly Exhibits 12, 13, 14 and 17, which were put in evidence here yesterday? Did you have any information outside of that about the condition of the *Portmar* on April 7th or April 8th? A. May I see those exhibits? Are they the telegrams from Michelson, the telegram from Malleson and the letter from Outler?

Q. 12, 13, 14, 17.

(Mr. Murphy hands exhibits to witness.)

A. Now your question, is this all the information we had as 482
to the condition of the vessel?

Q. Yes. A. That is right, that is all the information we had.

Q. You didn't know then that the *Portmar* was afloat on April 7 or April 8, 1942? A. No, sir.

Q. You didn't know whether any survey or inspection of the hull had been made by, anybody after she was beached? A. If it is not contained in this, we didn't know it.

The Court: You personally knew nothing of the *Portmar*. The only knowledge and information you had was what was conveyed to your company by communications from either the master or some 483
agents?

The Witness: That is right.

Q. Will you look at those exhibits and see if there is anything outside of the statement of the master, in Exhibit 14, namely, "Excessive damage makes salvage impossible," is there anything else in any of those documents that relate to the condition of the *Portmar* which you had on or prior to April 7 or April 8, 1942? A. Well, we have the telegram from Malleson, who were our Australian counsel, and reiterated by the master, stating that "Michelson considers constructive total loss and recommend we tender abandonment." We also have the letter from the Maritime Commission, Mr. Outler, which stated that "We have a dispatch

from the naval observer, Melbourne, reading as follows: 'Darwin advises the *Portmar* aground amidships to stern. Perforated port side by shrapnel. Does not believe can be salvaged as cargo carrier but might be as hulk or floating store.' " That is all the information we had.

Q. What was the date on which you received that last letter? A. This letter is dated April 3rd. We received it April 4th at 10.59 a. m.

Q. Did you see that letter before you sent the notice of abandonment to the underwriters? A. Oh, yes.

485 Q. I am referring to Exhibit 25. Will you please look at that? A. I have a copy of it.

Q. Contained in that schedule there, *Portmar* expenses, I assume are all the payments which were made at any time up to the present by the libelant resulting from the injury to the *Portmar*, is that correct? A. That is correct.

Q. What of those items do you claim should be paid by the underwriters that are sued as respondents in this action, that is, the war risk hull underwriters? A. That the salvage award——

Q. But I mean, where is that—I beg your pardon—where is that on the exhibit? Will you read the items from the exhibit? A. That is included, Mr. Hall, in the items

486 under 1, to Malleson Stewart, totalling $27,322.35, the salvage award and costs of $20,008.59 included in that.

Q. The items from 2 to 10, inclusive, you do not claim against the present underwriters at all, is that correct? A. Oh, no.

Q. Let us have them. A. No. 2 we claim from the underwriters, part of 3 we claim from the underwriters——

Q. What parts of 3 are claimed?

The Court: Have you a copy of this statement, Mr. Murphy?

Mr. Murphy: Yes, sir.

Have you an extra copy?

Mr. Hall: There is the exhibit itself, Judge.

The Court: You keep it, if you want to use it.

A. (Continuing) I have got it. Of the $1,643.99, we claim $346.87 of that as against the underwriters. That is for the items. Personal expenses leaving Darwin; expenses travelling from Brisbane via Sydney; expenses surveying ship, Brisbane; expenses at Sydney; fare to Melbourne, two trips; telegram to lawyers in Melbourne; payment for car hire; survey fee of R. Douglas Taylor and A. G. Horne; and then the cost of cables sent by Michelson—those were the cables that he sent to us.

Q. That included all the cables? A. No, that doesn't include all the cables, not our cables to him or to Malleson.

Q. But I meant, does it include all that Michelson sent? A. Yes. Then we claim wages paid to Captain Michelson from February 20, 1942 to his return to the United States. 488

The Court: If you are going to start in questioning items of $1.84, $17.85, I think we are going to run——

Mr. Hall: I did not make any stir about that.

The Court: I understand that there should be and there will be submitted to me a statement which will break up this Exhibit 25 into items which the libelant claims are charged to the respondent underwriters.

Mr. Hall: All right. 489

The Court: And that there will be no issue made on this trial as to the reasonableness of those expenses. I am only to determine the legal liability for them, if any.

Mr. Hall: Yes.

The Court: Am I right in my understanding?

Mr. Hall: I just wanted to be sure, when it came to making the computations here, we had overall computations that relate this time to the merits.

The Court: All right.

Q. When you received advices on the outcome of the salvage suit from Malleson Stewart & Company did you

490 receive a copy of the Court's opinion and judgment? A. Whether it was the same time, I don't know. I believe we had to write for that later, Mr. Hall.

Q. Have you a copy of the opinion here with you in court?

Mr. Murphy: I think we have one, yes. A. I don't have it.

Mr. Hall: I would like to have a copy to offer in evidence.

Mr. Murphy: If the Court please, it isn't in court
491 but we have it at the office.

Mr. Hall: All right, that is enough. You will produce it so we can offer it in evidence, will you?

Mr. Murphy: No, sir. I will produce it and you can look at it, but I will object to your offering it in evidence.

Mr. Hall: That's all right.

Q. Did you receive an itemized bill from Malleson Stewart showing what fees and expenses related to the salvage suit and what to other matters? Is that itemized in their bill? A. Yes, sir.

492 Q. Have you the copy of the bill there? A. That is the suit (handing paper to Mr. Hall).

Q. This is the only bill you have from Malleson Stewart for these services? A. For those services, yes, sir. We got a bill for a small amount that the master paid him, 29 pounds.

Q. Is that a claim against the underwriters in this suit? A. Yes, sir.

Q. When did Calmar first make any claim for payment for the title of the vessel *Portmar* as requisitioned by the United States on November 17, 1942? A. I don't recall the exact date we filed our libel in the Court of Claims. I believe it was February 1944. That is subject to check.

Q. Did you request payment at any time prior to that? A. We did not.

Q. How much have you ever received from the Government or what amount has ever been offered to Calmar Steamship Corporation for the reasonable compensation for the *Portmar* that was requisitioned?

The Court: That is two questions.

A. Nothing, to both questions.

The Court: All right, nothing, to both questions. 494

Q. When the charter hire deduction was made, I understand you to state that all of the charter paid for the month of February, subsequent to February 19, was set off on another bill by the United States? A. That is correct.

Q. Has full charter hire been paid up to the date of February 19, 1942? A. Except the $238 figure for feeding of these three passengers.

Mr. Hall: That is all.

Re-direct examination by Mr. Murphy:

Q. Mr. Groom, you were asked about your demand for 495 payment of just compensation for the requisition of title to the *Portmar*. I show you some photostats of letters and ask you if they refresh your recollection on that point? A. Oh, yes, they do.

The Court: I don't know how this has anything to do with the issues here.

Mr. Murphy: I don't think it has, your Honor, but you allowed broad cross-examination and I just wanted to correct one thing.

The Court: Even though he may have gone into it, he may, but why bother with it? I don't think it is within the issues here.

Mr. Murphy: All right.

The Court: It might become important if they received payment.

Mr. Murphy: May I ask just one question? I won't bother with the exhibit.

Q. Did you ask the Maritime Commission to determine, pursuant to statute, the amount of just compensation due to your company for the requisition of title to the *Portmar*? A. We did.

497 Q. When did you do that? A. Letter dated August 29, 1947 and a tracer dated October something 1947.

Q. October 29, 1947? A. October 29, 1947.

Q. Did the Maritime Commission ever determine the amount of just compensation? A. We got a letter from the chairman, April 1948, saying that since we had sued the Government, why, it wasn't necessary.

Q. Mr. Groom, you were asked by Mr. Smith as to whether you ever attempted to regain possession of the *Portmar* after the disaster of February 19. I will ask you to assume that the master's testimony in this case is that he attempted to go on board the *Portmar* at Brisbane and was barred by the Army authorities. Were you aware of

498 that when you made your answer? A. I had forgotten that.

Q. You were questioned by Mr. Hall as to sailing directions given to the *Portmar*. In answering Mr. Hall as to the sailing directions given by the Government, what did you mean by sailing directions? A. Directions on his voyage from San Francisco to Manila.

Q. Does your answer now refer to the port of destination of the vessel? A. Yes.

Q. Does it relate to any directions as to how the master is to navigate? A. Oh, no.

The Court: It does relate, however, to the course to take.

The Witness: Yes.

The Court: To reach the destination.

The Witness: Right, sir.

Mr. Murphy: Did your Honor say it does or does not?

The Witness: It does.

The Court: It does relate to the course he is to take.

Q. But as to the course to be followed, Mr. Groom, do such orders come from the Government as charterer or as sovereign through the Navy? A. We understood they came as sovereign through the Navy.

Mr. Murphy: That is all I have, your Honor.

Re-cross examination by Mr. Hall:

Q. Mr. Groom, how do you know they came from the United States as sovereign? A. You are asking me as a layman or a lawyer?

Q. I am asking you, in response to the last answer you gave——

Mr. Murphy: I will object to that as calling for a conclusion, your Honor. That cannot help the Court.

Mr. Hall: This is cross-examination.

The Court: The captain has testified, as I understand it, that when he left port he received sealed orders from the naval authorities. He opened the sealed orders. This seems to me to be a lot of nonsense. Objection sustained. He got sealed orders and he said he got them from the——

Mr. Murphy: Those are not charterer's orders. Those are naval orders.

The Court: That is my recollection of what he said.

Mr. Murphy: Your Honor is right.

Mr. Mount: Your Honor is right.

(Witness excused.)

The Court: As I understand it, as part of Mr. Groom's testimony, you are going to make another exhibit, which will be known as 25-A, in which you will list the items out of Exhibit 25 that you claim are chargeable against the underwriters in this suit; you are going to itemize them and set them forth?

Mr. Murphy: Your Honor will recall we used the term "sue and labor expenses." Those are the expenses——

The Court: You are going to pick them out of this Exhibit 25 and set them forth in a schedule which we will call 25-A, and they will be agreed upon, and I assume that they may be marked and received in evidence without calling Mr. Groom back to the stand.

Mr. Mount: Yes, without agreeing all the items are proper.

The Court: You don't dispute the reasonableness of the expenses but you dispute legal liability for them?

Mr. Hall: Well, may I explain this? One of those items is the captain's salary for the whole year while he was kept there by Calmar in Australia, and we say that doesn't apply to the physical damage of the vessel, which was what we insured.

The Court: Yes, but you don't dispute that the item charged for the captain's salary is reasonable in amount?

Mr. Mount: Oh, no.

The Court: You say you are not liable for it?

Mr. Mount: That is it.

The Court: You concede the reasonableness of the expenditure but you dispute liability for it?

Mr. Mount: Right.

Mr. Murphy: If the Court please, I offer in evidence the deposition of Axel Michelson, master of the *Portmar*, taken in these actions on July 17, 1945 and at subsequent dates.

As to the exhibits offered in connection with that deposition, many of them have been already offered in Mr. Groom's testimony.

I will offer the plaintiff's exhibits now, if the Court will permit, and I will do it as quickly as possible.

The Court: Before you offer the exhibits, let us 506
see what we are going to do with this deposition itself.

I will receive it in evidence without requiring that it be read, provided it is understood that all objections made in the course of the taking of the deposition are withdrawn, otherwise we will have to have it read.

Mr. Mount: We don't require it to be read.

Mr. Murphy: You withdraw all objections?

The Court: You withdraw all objections made?

Mr. Mount: Yes. There is one point in the minutes where I called on Mr. Murphy to produce the judgment of the salvage court: That has been 507
referred to this morning.

The Court: He said he will do it.

Mr. Murphy: I will produce it for Mr. Mount to look at.

The Court: He says he objects to its relevancy or competency, but he will produce it. But all objections on the deposition of the master are considered withdrawn by the respondent underwriters.

Mr. Smith: And by the Government too.

The Court: And by the Government too. And the libelant?

Mr. Murphy: We have no objection.

508 *Colloquy.*

The Court: If I find any in there, I will consider them withdrawn.

Mr. Murphy: Yes, sir.

The Court: Then we will mark the deposition in evidence.

(Marked Libelant's Exhibit 26.)

The Court: Now then, you tell me that the deposition, which was marked as Libelant's Exhibit 26, has reference to a number of exhibits which have exhibit numbers in the deposition itself, that some of 509 those exhibits have already been offered in evidence, and you will now proceed to offer the balance in evidence?

Mr. Murphy: Yes.

The Court: And I assume, as we receive them in evidence, you will follow along in numerical order but that these exhibits also have notations on them which will permit me to relate them to the captain's deposition, is that correct?

Mr. Murphy: That is correct.

I offer the profile and deck plan and general particulars of the *Portmar.*

510

(Marked Libelant's Exhibit 27.)

Mr. Murphy: I offer protest noted by the master January 22, 1942.

(Marked Libelant's Exhibit 28.)

Mr. Murphy: I offer a chart of the Harbor of Port Darwin with notations thereon by the master.

(Marked Libelant's Exhibit 29.)

Mr. Murphy: I offer photostat of a receipt dated February 21, 1942, certain documents being named therein.

511

(Marked Libelant's Exhibit 30.)

Mr. Murphy: I offer a memorandum from Lieutenant-Colonel Frank LaRue, Infantry, to Captain Michelson, dated February 26, 1942.

(Marked Libelant's Exhibit 31.)

Mr. Murphy: I offer protest dated March 23, 1942, before the Vice-Consul of the United States at Melbourne, Australia.

(Marked Libelant's Exhibit 32.)

512

Mr. Murphy: I offer extended protest dated March 25, 1942, signed by the master of the *Portmar*, and also by Joseph E. Bullock, mate; John V. Cumber, chief engineer; and Charles H. Matthews, deck engineer; and Ivan D. C. Steen, AB, dated March 25, 1942.

(Marked Libelant's Exhibit 33.)

Mr. Murphy: I offer protest noted by Captain Michelson before Edward James Hamilton, notary, at Melbourne, Australia, dated March 27, 1942.

(Marked Libelant's Exhibit 34.)

513

Mr. Murphy: I offer extension of protest, dated March 27, 1942, before said notary, Edward James Hamilton, at Melbourne.

(Marked Libelant's Exhibit 35.)

Mr. Murphy: I offer deck log of *Portmar* for the period November 20, 1941 to January 20, 1942, inclusive.

(Marked Libelant's Exhibit 36.)

Mr. Murphy: And a further deck log, continuing for the period from January 21, 1942 to February 19, 1942, inclusive.

514 *Colloquy.*

(Marked Libelant's Exhibit 37.)

Mr. Murphy: I offer photostat copy of official log of the *Portmar*, relating to the events beginning February 15, 1942 and following days.

(Marked Libelant's Exhibit 38.)

Mr. Murphy: I offer a letter dated August 1, 1942 from Captain Michelson to Captain Douglas Taylor, Brisbane.

(Marked Libelant's Exhibit 39.)

515

Mr. Murphy: I offer a letter from Captain R. Douglas Taylor, Brisbane, to Captain Michelson, dated August 4, 1942.

(Marked Libelant's Exhibit 40.)

Mr. Murphy: I offer a paper bearing the signature of T. G. Plant, Colonel, United States Army, Chief of Water Section, apparently a memorandum addressed to the Superintendent of the Army Transport Services, Base Section 3, A. P. O. 923, dated July 27, 1942, also bearing the signature of Captain Michelson, and a further notation by an officer named Grimm.

516

(Marked Libelant's Exhibit 41.)

Mr. Murphy: I offer a letter addressed to Captain Michelson, signed by one J. P. Williams, chief salvage officer, dated August 13, 1942.

(Marked Libelant's Exhibit 42.)

Mr. Murphy: I offer copy of a letter from H. F. E. Whitlam, Crown Solicitor, on the letterhead of the Commonwealth of Australia, to Messrs. Malleson Stewart & Company, Melbourne, dated August 19, 1942.

(Marked Libelant's Exhibit 43.)

Mr. Murphy: I offer copy of a letter from Captain Michelson to Malleson Stewart & Company, dated at Brisbane, August 14, 1942.

(Marked Libelant's Exhibit 44.)

Mr. Murphy: I offer copy of letter from Captain Michelson to Messrs. Malleson Stewart & Company, dated August 15, 1942, with an addendum of the same date and a further addendum of August 17, 1942.

(Marked Libelant's Exhibit 45.)

Mr. Murphy: I offer a report headed "Preliminary" by Lieutenant Commander A. G. Horne. This is a photostat copy of a handwritten document.

(Marked Libelant's Exhibit 46.)

Mr. Mount: Your Honor, I didn't object to the introduction. This is the report, you will remember, to which we referred, where we were not represented at the survey. It was an ex parte survey.

The Court: You call that to the Court's attention for the purpose of impressing the Court with the weight to be given to it?

Mr. Mount: Exactly.

Mr. Murphy: I offer an original survey report of R. Douglas Taylor, marine surveyor, and A. G. Horne, marine surveyor, dated August 14, 1942.

The Court: This is the survey at which there was joint participation?

Mr. Mount: That is in the same category as the preceding one.

The Court: Mr. Mount, I just wanted to straighten myself out on a point. At the time you were tendered abandonment did the underwriters undertake to make their own survey?

520 Mr. Mount: No.

Mr. Murphy: Oh, at the time? No, sir, they didn't. They did later. They attended later.

The Court: But they did not at the time they rejected abandonment?

Mr. Mount: No, because all we knew was in the cable that was sent to them.

The Court: But you rejected abandonment without making a survey at that time?

Mr. Mount: Yes.

521 (Marked Libelant's Exhibit 47.)

Mr. Murphy: If the Court please, Exhibit 50, offered in the master's deposition on August 1, 1945, is a batch of accounts dealing with the expenses, which I now understand have all been shown in the testimony of Mr. Groom. I simply wish to account for not offering that large batch.

The Court: You had better put it in evidence, even if there is no dispute, because we may look for it and not find it. So let us put it in and complete the record.

Mr. Murphy: I offer in evidence the account of
522 expenditures and disbursements made by Captain Michelson after the disaster of February 19, 1942, being a sheaf of papers annexed to an initialed statement of account.

(Marked Libelant's Exhibit 48.)

Mr. Murphy: I offer a copy of a joint survey made at Sydney, Australia, February 15, 1943. This, if the Court please, was called Underwriter's Exhibit A on the deposition, but I will offer it now as it is a fact in the case.

(Marked Libelant's Exhibit 49.)

Mr. Murphy: If the Court please, I now offer in evidence the deposition of the chief officer, Joseph E.

Bullock, taken at New York on or about August 2, 1945 in both these proceedings.

The Court: All objections are withdrawn?

Mr. Mount: I don't think we have any objections.

The Court: If you had, they are all withdrawn?

Mr. Mount: Yes.

The Court: By all sides?

Mr. Smith: Yes.

The Court: Then I will receive it.

(Marked Libelant's Exhibit 50.)

524 Mr. Murphy: According to our records, if the Court please, there were no exhibits offered in connection with Chief Officer Bullock's deposition. They were all put in under the master's testimony.

As I understand it, it has been agreed, at Mr. Smith's request, that the deposition given by Captain Michelson on December 5, 6 and 7, 1950, in the action now pending in the Court of Claims, is to be accepted in these proceedings as though the captain had testified here all over again.

The Court: Does it contain new matter?

525 Mr. Murphy: There are one or two new points that go a little beyond his former testimony.

The Court: Aren't you burdening me? I have an intolerable burden here now with a minimum of time to undertake it. I don't think that I should have to read through the same testimony twice. If you want to cull out certain parts of it——

Mr. Murphy: I would like to read into the record one or two questions.

The Court: That is fine.

Mr. Smith: If the Court please, may I suggest it be limited to the cross-examination and the exhibits connected with the cross-examination?

Mr. Murphy: No, there is one little thing here I want to get in from the direct that is not in this deposition——

526 The Court: You are going to bury it away in these minutes and when I come to review the case it might escape my attention. Why don't you take such portions of this deposition, which was taken in the Court of Claims litigation, that you desire to have marked in evidence in this case, and have them typewritten and placed in a separate volume and introduce them as an exhibit in this case?

Mr. Murphy: Will your Honor assign an exhibit number now to that?

527 The Court: Yes, we will give that the next number, 51.

Mr. Smith: Will that include the entire cross-examination?

Mr. Murphy: Anything you want to put in.

The Court: How many pages was your cross-examination?

Mr. Smith: It isn't much.

The Court: There is no objection to that, Mr. Mount? It is not a deposition in this case.

Mr. Mount: No, I think we may be able to have no objection to what they finally boil down to——

The Court: Yes.

528 Mr. Mount: —but I would not want to commit myself now.

The Court: All right, we will consider that you consent on the record now, and we will give you permission to withdraw your consent if, after examination, you find it is necessary to do so.

Mr. Mount: Thank you.

Mr. Murphy: In the course of testimony in the Court of Claims case, if the Court please, Mr. Smith asked the master to prepare from data which he did not have with him, but which he had at home in Oakland, California, a list of the positions through which he was ordered to pass by the sailing orders of the Navy which were given to him on sailing from San

Francisco. And Mr. Smith asked the captain to write those positions down on a sheet of paper. The captain had noted them, in order to preserve them in case the ship was lost or he was lost, on different pages in his Bowditch navigating manual, keeping them separated, so he could find them again if he had to find them, and he still had it. So the master went back to California and then prepared a sheet of paper which he mailed to Mr. Smith, with a copy to me, and I now offer in evidence that list of positions which the captain mailed to Mr. Smith, which 530
sets forth the track of his voyage as ordered by the Navy on departure of the vessel from San Francisco.

Mr. Mount: No objection.

(Marked Libelant's Exhibit 52.)

The Court: It is conceded that this Exhibit 52 is a statement of the positions through which the captain was directed to pass under the sailing orders at the time he set sail from San Francisco, at the commencement of the voyage, is that correct, Mr. Mount?

Mr. Mount: Yes.

531

Mr. Murphy: I offer in evidence a copy of the chart offered in evidence by the Government at the depositions in December, on which the master marked——

The Court: December 1950?

Mr. Murphy: December 1950.—on which the master marked, according to his then recollection, the various positions which the Navy ordered him to pass through, and on which he also marked the position he was at when he heard the news of Pearl Harbor, and the position he was at when he got the naval order of December 11 to go to Suva in the Fiji Islands. And on that chart we have plotted——

The Court: I thought you were going to get together?

532

Mr. Murphy: We are going to.

The Court: Then why put this in?

Mr. Murphy: All right, your Honor, I withdraw that.

The Court: You are going to get together and prepare a chart which will show the voyage of the vessel, and its location on the important dates.

Mr. Murphy: I withdraw that offer in response to the Court's remark.

The Court: Don't give me a photostat. Send down to the National Geographic Magazine and, for 25 cents, you will get a nice map of the Pacific and it will be something I will be able to read and will be helpful.

533

Mr. Murphy: The libelant rests, your Honor.

The Court: I am going to make a suggestion to the libelant, and the same suggestion I would like followed by the respondents' underwriters and Government. I think at the time you prepare your briefs there should be a list of the exhibits by numbers and a little description after each number, such as Libelant's Exhibit No. 1— I don't know what it is now—"charter party," and go right through with a little descriptive list. I think there also should be a separate list of the exhibits set forth in the depositions and those exhibit numbers in the depositions should be related to the exhibit numbers in this suit.

534

Mr. Mount: Parallel columns, you mean?

The Court: Yes. So that if I am reading the deposition and I see Exhibit No. 10 of the deposition, and I want to look at that exhibit, I will know where to find it.

Mr. Murphy: Yes, your Honor, we will do that.

The Court: And each side, at the end of this trial, will take their exhibits with them, and when you submit your briefs, send up in an envelope your exhibits and these statements of what the exhibits are and the statements relating the exhibit numbers

535

in the depositions to the exhibit numbers in the litigation.

Mr. Murphy: Yes.

The Court: All right?

Mr. Mount: Yes.

The Court: Mr. Smith, you are next. Are you ready now or do you want a five-minute recess?

We could even set forth an exhibit number for that map you are going to prepare.

Libelant's Exhibit 53 is now offered and considered in evidence and it is to be a map of the Pacific waters on which the voyage is to be traced, and the location of the ship is to be designated on dates of importance, and that is to be agreed upon by all the parties; and if you have difficulty, I will try to get you together.

536

Mr. Murphy: Yes, sir.

(Short recess.)

Mr. Smith: At the outset, I understand that all parties are now prepared to stipulate that the sound condition value of the *Portmar* at all material times to this proceeding was $688,000, is that correct?

537

Mr. Mount: That is correct.

Mr. Murphy: That is correct, your Honor.

The Court: I thought your libel alleged $800,000.

Mr. Murphy: No, that is the insured value.

The Court: That is the stipulated insured value?

Mr. Murphy: The $860,000 is the insured value named in the policy. This amount, $688,000——

The Court: Yes; that $800,000—odd is the stipulated insured value.

Mr. Mount: It is the agreed insured value.

The Court: What I would call the stipulated insured value in the policy.

Mr. Murphy: In the policy. This figure is the actual value, actual sound value.

The Court: What do you give it?

538

Mr. Smith: $688,000.

The Court: That is agreed.

Mr. Smith: I offer in evidence a duly authenticated copy of the naval routing instructions given to the *Portmar*, from which has been deleted by the Navy Department the list of points actually given the vessel's master, through which he was supposed to pass, but containing all of the other features of the instructions.

The Court: The points have been given by the captain.

539

Mr. Smith: That is right.

(Marked Respondent U. S. A. Exhibit A.)

Mr. Smith: I offer in evidence a duly authenticated copy of the naval dispatch sent by radio to the *Portmar* on December 7, 1941.

(Marked Respondent U. S. A. Exhibit B.)

Mr. Smith: I offer in evidence duly authenticated copy of the naval order sent to the *Portmar* on December 11, 1941 with respect to proceeding to Suva for further instructions.

540

(Marked Respondent U. S. A. Exhibit C.)

Mr. Smith: I offer in evidence a copy of a casualty report filed with the United States Coast Guard, signed by the *Portmar* master, dated March 26, 1943.

(Marked Respondent U. S. A. Exhibit D.)

Mr. Smith: I offer in evidence certified copy of a casualty report signed by the president of Calmar Steamship Corporation with respect to the *Portmar*, dated July 6, 1942.

Mr. Mount: I have no objection to that. The Court will, of course, note that whatever the presi-

dent of Calmar said was based only on information that he had received.

(Marked Respondent U. S. A. Exhibit E.)

The Court: Let me see if I fully appreciate the effect of this stipulated sound value of the vessel.

If I find against the Government, then the maximum amount that could be awarded—

Mr. Smith: No. I don't believe that the value of the *Portmar* has any bearing in these proceedings except this: We say that under the charter party we are not bound by the insurance value— 542

The Court: That is right.

Mr. Smith: —and that we consider that the value of the *Portmar,* for the purposes of determining whether she is a constructive total loss within the meaning of the charter party, is her actual value on material dates. It has now been stipulated that that actual value is $688,000. In the Court of Claims I think that that value will have other significance with respect to the Government liability, but in this proceeding I think it is limited to that.

The Court: I am to determine here, as I understand my function, the question of damage as well as 543 liability.

Mr. Smith: That is quite true, and the Government maintains, of course, that it is not liable in these proceedings for the value of the *Portmar,* either the insured value or the actual value.

The Court: Yes, but if I determine that in these proceedings the Government is liable for the value of the vessel at the time it was damaged, the effect of this stipulated sound value, I take it, on first blush without looking at the law, would limit the recovery against the Government to $680,000-odd, whatever the stipulation says.

Mr. Smith: If your Honor finds that the Government, as Mr. Murphy contends, is liable for having

prevented them from collecting the insured value from their underwriters, the Government might be liable for $860,000.

Mr. Murphy: That is our point.

Mr. Smith: We contend that there is nothing whatsoever to that point. If your Honor finds that the Government is liable for the actual value of the *Portmar*, the actual value of the *Portmar* has been stipulated for all purposes of this case at the figure stated.

545 Mr. Murphy: I think that is a correct statement.

The Court: Since the liability of the Government for the damage done to the *Portmar* arose out of the contract, and the libelants were insured in a greater amount, then if they are entitled to recover, they would be entitled to recover the greater amount, the insured value,—

Mr. Murphy: That is right.

The Court: —because it was the amount within the contemplation of the parties?

Mr. Murphy: That is right.

Mr. Smith: No, if your Honor please—

546 Mr. Murphy: Your Honor stated our contention correctly.

Mr. Mount: Exactly.

Mr. Murphy: That is my contention.

Mr. Smith: The Government doesn't concede that.

The Court: No, but that is the libelant's contention.

Mr. Murphy: All we are stating here are respective contentions.

The Court: I was just trying to determine, if I could, the legal significance of the stipulated sound value in my own mind.

Mr. Smith: The only stipulation has been that the sound value of the vessel for all purposes of these proceedings, so far as material, is $688,000.

THOMAS G. PLANT, called as a witness on behalf of the respondent U. S. A., being duly sworn, testified as follows:

Direct examination by Mr. Smith:

Q. What is your address, Colonel? A. Santa Rosa, California.

Q. Have you been connected with the shipping field in the course of your lifetime? A. From 1907 until I retired in 1948.

Q. Will you state briefly your experience in that field? A. Most of the period was with the American-Hawaiian 548
Steamship Company, the last 25 years of which I was vice-president in charge of operations.

Q. In 1942 were you part of our armed forces? A. I was commissioned in the Army and sent overseas.

Q. What commission did you obtain? A. Colonel.

Q. What assignment did you receive? A. I was sent from Washington to be Chief of Water Transportation in the Southwest Pacific area, to organize and to operate water transportation down there.

Q. When did you receive that assignment? A. The early part of February. About the 3rd of February.

Q. When did you proceed to the Southwest Pacific area? 549
A. I left New York on the 11th intending to fly right through by air. We were interrupted in the Middle East and finally had to proceed by surface transport. We arrived there the end of March.

Q. When you arrived in Australia where did you set up shop? A. In Melbourne.

Q. Could you tell us something of the conditions that existed in Australia at the time of your arrival, with particular reference to the condition of water transport generally in the area? A. No. 1, the Army Command was in process of organization under General MacArthur as the Supreme Commander. Preceding his arrival in Australia, scattered air men and other units that had arrived there,

550 under their superior officers, had done whatever they could to take preliminary charge of the situation. Vessels had put in there for refuge, and had been diverted to Australia from many other intended destinations, and even at the time of my arrival many vessels were there with cargo still on board them, not unloaded.

Q. Did you know of the nature and usefulness of various cargoes aboard vessels? A. In many cases we did not, Mr. Smith.

Q. Can you tell us something of the military situation at that time? A. Well, the Japs had driven as far East as 551 to include all of the Dutch East Indies. They had made an air strike on Colombo, in the middle of March, which had been repulsed. They had penetrated all along the north coast of New Guinea. The invasion of the northern part of Australia was threatened. The Cape York Peninsula had been ordered evacuated down to Brisbane. The defense line had been set up 15 miles north of Melbourne. Melbourne is on the south coast. All of which, I think, indicates the seriousness of the military situation.

Q. What was the situation at Darwin so far as you were advised? A. Darwin had been heavily bombed on the 19th of February, many ships sunk and the town virtually de- 552 stroyed. The Navy had left Darwin, the few naval units we had, and had proceeded to Exmouth Gulf on the West Coast.

The Court: Where had they proceeded?

The Witness: To Exmouth Gulf, your Honor. It is about halfway down the west coast of Australia. They made a base down there.

Could I point it out for you, sir?

The Court: I see it here. It is quite clear. It is quite a distance down the coast. Down to here (indicating).

The Witness: That is it. That is about halfway down. This covers only the northern half (indicating chart).

The Court: About how many miles would you say that was?

The Witness: From Darwin?

The Court: To the southwest of Darwin.

The Witness: Should be 1500 miles.

The Court: And the Navy had abandoned Darwin?

The Witness: Yes.

The Court: Pulled out. Were there any armed forces up there?

The Witness: There were a few. There was a 554
small detachment of soldiers——

The Court: Where had the defense line been set up?

The Witness: —on the Cape York Peninsula.

The Court: That is where?

The Witness: Over here, Cape York Peninsula (indicating). We had, in the extreme northerly end, a detachment of 50 American soldiers. Those were the most northerly troops we had on the York Peninsula.

Q. What was the situation with respect to the need for 555
military materiel and equipment of all kinds at that time? A. Well, we were in the process of trying to get troops, to begin with. As to equipment, the whole job initially was to discharge ships that were there, sort out their cargo, find out what they had, and to find out where they could be used to the best advantage. So we did the best we could under the circumstances.

The Court: Who had possession of the Timor Islands?

The Witness: The Japanese.

The Court: And the Tanimbar Islands?

The Witness: And then clear over to include Sumatra, clear to the westward, and from Sumatra

556 westward they had actually bombed the Island of Ceylon and the Port of Colombo.

The Court: One more question for my own information: What was the distance south of the Tanimbar Islands—from the Tanimbar Islands to Darwin?

The Witness: From latitude 15 north to latitude 9 north. 5 degrees, 300 miles.

The Court: 300 miles?

The Witness: 300 miles, roughly.

The Court: The Japs were only 300 miles away
557 with armed forces from Darwin?

The Witness: Yes, sir, and submarines in the sea.

The Court: And submarines what?

The Witness: In the sea, and surface craft as well.

The Court: You mean Japanese submarines?

The Witness: Yes, sir.

The Court: And Japanese surface craft?

The Witness: Yes, sir.

The Court: All right.

558 Q. What were your responsibilities with respect to the dispatching of craft and making of decisions with respect to carriage of cargo and the like? A. The procurement and the assignment of all vessels on all military and supply missions.

Q. What vessels did you exercise control with respect to? A. Every vessel we could get our hands on. There weren't very many down there. Australia had been in the war with Great Britain for two years. The empire had drawn practically all coastal ships from Australia.

Australia's life depends on coastal shipping and they were desperate for covering their own needs, so we had very few Australian vessels we could depend upon. Some 21 small Dutch vessels had escaped when the Dutch East

Indies were seized by the Japanese, and some of those were heavily bombed and damaged. We got those and repaired those. In the meantime, we were looking around desperately for anything that was afloat or could be made to float.

The Court: Where did you repair those?

The Witness: The Dutch ships were repaired in various ports from Brisbane south to Melbourne.

The Court: When were those repairs made?

The Witness: Beginning from the time they arrived there. They escaped to Australia and the repairs were made as rapidly as the very limited 560
facilities permitted. Some weren't completed until the end of 1942.

The Court: Until the end of 1942?

The Witness: Until the end of 1942.

The Court: I am talking about facilities available. I should be interested to hear about that.

The Witness: If I may comment on that, your Honor.

The Court: Yes.

The Witness: Australia has never been an industrial country, and particularly has never been a shipbuilding country. Their ships have been built 561
in Great Britain. They had a very limited number of repair yards. So the facilities weren't there.

Q. Did it make any difference with respect to the control which you exercised over vessels at that time whether or not they were owned or chartered to the United States or any government? A. None whatsoever.

Q. In making decisions with respect to dispatching vessels to various points did you regard commercial considerations of any sort? A. No, sir, military only.

Q. Were you advised as to the situation that existed with respect to controlling vessels prior to your arrival? A. I was given very complete authority in Washington to

take any ship in Australia and to do what we pleased with it.

Q. Did you have any official information as to the practices followed by military authorities with respect to controlling vessels in Australian waters prior to your arrival? A. Well, I understood that they had exercised the same authority before I arrived there.

Q. And for how long before you arrived? A. From the time the first elements arrived.

Q. When was that, about? A. Not awful long after
563 December 7, 1941, because many ships on the high seas at that time with military units aboard were diverted to Australian ports.

Q. Could you keep your voice up a little bit? What was the first you learned about the *Portmar*? A. Within a very few days—almost immediately after I arrived in Melbourne.

Q. Will you tell us what first brought that vessel to your attention? A. I cannot say for sure whether I learned it from Army officers there or from Captain Williams, but the first knowledge I had of the *Portmar* was that she had been sunk in the Darwin raid, that she had artillery aboard that was badly needed, and that Williams, a private salvor, had gone to Darwin to get the guns out of the ship. Some little
564 time after that, in fact, very shortly, Williams came in to see me and told me he had gotten the artillery out of the *Portmar* and that the ship was much less badly damaged than he had thought and others had thought, and that he was sure he could get it up. I said, "Get it afloat."

The Court: When did he tell you that, as best you remember?

The Witness: A very short time after I arrived there. As to the date, I cannot say.

The Court: Was it May or April?

The Witness: I would say it must have been late in March or the very first part of April because the *Portmar* was one of the first matters that came up.

Q. Subsequent to that conversation with Mr. Williams did you have further communications with Mr. Williams? A. I did, after the ship had been floated.

Q. In general what was the nature of your relations with Mr. Williams? A. Williams, when I dealt with him, was the chief salvage officer for the Commonwealth Salvage Board. Between the salvage of the artillery from the *Portmar* and our arrangement to get the ship afloat, the Commonwealth had taken over all salvage activities in Commonwealth waters and Williams had gone in as chief salvage officer.

566

Q. Did he make reports to you from time to time as to the progress of the salvage operation? A. Only after he had returned because communications were out of the question. You couldn't communicate anywhere, and I didn't hear from him until he came back.

Q. Did he report to you what was done in connection with the *Portmar*? A. Yes, sir, the ship was afloat and she was in condition to be towed.

The Court: Why was communication impossible from Darwin?

The Witness: Well, the telephone network in Australia is very archaic, your Honor, and even with 567 the assistance that the Signal Corps lent them, it was almost a year before we had any communications that were worthwhile. There is no through rail line to Darwin. Part of it is by rail and part by truck over a very bad desert road.

The Court: How far does the railroad line extend?

The Witness: The rail line runs, from the south, from Adelaide about, guessing at it, 1500 miles up to a place in the James Mountain Range, Alice Springs, and then you take off and go about 500 miles through the desert by truck to a little town, Tennants Creek, and then you go about 500 miles by narrow gauge railroad up to Darwin.

Mr. Murphy: Did you say "narrow gauge"?

The Witness: Narrow gauge, yes, sir.

The Court: In March 1942 had there been any landing of the Japanese in Melville Island, do you know?

The Witness: Not that I recall.

The Court: Had there been any landing parties of Japanese in any of these areas in the vicinity of Darwin?

The Witness: No.

569 The Court: Or the York Peninsula?

The Witness: No, sir.

The Court: Could you tell us whether the waters in the vicinity of Darwin or Melville Island were under the control and domination of the Japanese armed forces?

The Witness: They were after February 19, your Honor, because the only naval forces that we had had there left Darwin after the bombing on the 19th.

The Court: That continued for how long, would you say?

The Witness: I don't recall that there was any

570 attempt at penetration northward until late in 1942.

Q. Colonel, I show you what purports to be a copy of a letter addressed to you by Mr. Williams, and an attachment, and ask if that will help you to refresh your recollection as to what Mr. Williams reported to you was done in connection with the salvage of the *Portmar* by him? A. Generally it does, Mr. Smith, yes, sir.

Q. Could you tell us what Mr. Williams reported that he did in connection with the salvage operation of the *Portmar*? A. You mean in detail?

Q. In as much detail as you can, remembering that the——

The Court: Is this paper the Colonel looked at a communication from the master?

571

Mr. Smith: A communication from Mr. Williams to him.

A. Pumps were procured and placed on board. And due to the extreme rise and fall of the tide at Darwin, some 27 feet, the after hatches were exposed at low water. With high capacity pumps, Williams was able to partially free the after compartments of water and to get some sort of patches on the shrapnel holes, that is, to make a temporary repair job to the skin of the ship, and eventually, by repeating that process on successive tides, he got the ship free of water and kept it free with pumps.

572

Q. Where were the pumps obtained? A. In Adelaide, I believe. They came from the south and they went north by rail and truck.

Q. Could any commercial interest have obtained those pumps at that time? A. I doubt it very much because all salvage operations—all salvage equipment was under the control of the Government.

Q. Was the Government allocating any salvage equipment to commercial interests? A. No, sir.

Q. After the *Portmar* was gotten afloat were arrangements made to tow her anywhere? A. Yes, sir.

Q. Will you tell us about this? A. Arrangements were made through Captain Williams to obtain tugs and to tow the vessel to Brisbane, which was the nearest safe port.

573

Q. Can you tell us what Captain Williams reported to you concerning the progress of that tow? A. Well, there was no possibility of obtaining any naval escort in waters dominated by the Japanese, so that the personnel of the tug had to be carefully picked, realizing they were undertaking a very hazardous voyage, and largely they ran by night and anchored by day, holing up in coves where they could. They made quite a long detour around Melville Island and through the Gulf of Carpenteria. I could point that out to you, north of Melville Island (indicating).

The Court: Just describe that again.

The Witness: Leaving Darwin, the tow proceeded around Melville Island, around Groota Eylandt, inside of the Gulf of Carpenteria, out through Torres Strait, and then down the coast to Queensland.

The Court: Following the shoreline?

The Witness: Following the shoreline, and by daytime, wherever they could, holing up under cover so the Jap airplanes and Jap subs, surface craft, couldn't spot them and sink them.

575 The Court: Were they traveling through an area——

The Witness: Completely dominated by the Japs.

The Court: —subject to bombing?

The Witness: No bombing because it is almost completely unpopulated there.

The Court: Completely dominated——

The Witness: Completely dominated by the Japanese.

The Court: They had control over all this area and control over the waters too?

576 The Witness: Yes, sir, that is true in this area here. When you come off the coast of Queensland there was a different situation.

The Court: After they rounded the point?

The Witness: After they rounded the point.

The Court: But until they rounded the point, the waters were Japanese-controlled?

The Witness: Japanese territory.

The Court: So they sailed this through enemy-controlled waters?

The Witness: Yes, sir.

Q. In your estimation, Colonel Plant——

The Court: One more question. Who manned the ship on that voyage?

The Witness: An Australian salvage crew, Australian seamen.

Q. In your estimation, Colonel Plant, could arrangements have been made commercially to have that tow performed? A. No, sir.

Q. Why was it undertaken, Colonel Plant? A. Because the ship still had some usefulness to her if someone could get her to a place where she could be repaired.

Q. To whom did it have most usefulness? A. To the Army.

578

The Court: From your knowledge of the conditions would you say, as the ship lay on the beach, that it had usefulness to its civilian owner?

The Witness: He couldn't do a thing with it, your Honor. He was in a helpless position.

The Court: Why was he helpless?

The Witness: He couldn't obtain facilities or personnel to raise the vessel. Even if he had succeeded in doing that, he couldn't move it. There were no repair facilities there. The third point, even if he had moved the vessel to a repair port, he then couldn't have had the vessel repaired. There were three strikes against him right from the start. 579

The Court: What were the possibilities of him overcoming those strikes, as you described it?

The Witness: I would say none whatsoever.

The Court: Was there any immediate prospect of changed conditions?

The Witness: I would say the situation got worse from that standpoint as the year progressed.

The Court: And it remained worse until how long?

The Witness: We were in the low priority, your Honor. The campaign in Europe had No. 1 priority and we got what was left out there. We were strapped until things began to improve in Europe in 1944. We were on shortcomings the entire time. We

made our first landings in New Guinea on rafts made out of the trunks of cocoanut trees, palm trees.

Q. When the *Portmar* arrived at Brisbane did you have an opportunity to see her? A. I did.

Q. Were reports made to you about her condition? A. They were.

Q. Will you tell us something about the shape she was in when she arrived at Brisbane? A. She had been under water—the major part of the ship had been under water for some time. She was completely coated with oil and
581 muck and debris. A full examination as to her physical condition was not possible until she was cleaned up.

Q. What facilities were available at that time for making repairs to the *Portmar*? A. Commercial facilities?

Q. Yes. A. None.

Q. What facilities were available to you? A. None.

Q. How did you go about obtaining facilities to make repairs at that time? A. Well, if I could explain, Mr. Smith, in the first place; as I said before, Australia is not a shipbuilding country, not an industrial country, and the shipyards were few and far between at the best. What there were were solidly under Navy control. The Navy had
582 priority. They had had the Battle of the Coral Sea. Every facility in Australia had some naval unit being repaired. We could not get any priority for commercial craft at all.

Q. In other words, all of the Australian shipyards were filled with warships damaged in the Battle of the Coral Sea, is that correct? A. You say all. I don't know whether there was any facility in Adelaide or not, but everything on the east coast was. I cannot recall any facility in Adelaide. But we couldn't get a priority. I think that that was the important point. We couldn't get any priority for the work.

Q. What was the situation in respect to effecting repairs in the United States at that time, if you know? A. Couldn't get any work done here either.

Q. Can you tell us on what you base that? A. At that time and thereafter we had numerous vessels seriously damaged which we wanted to have repaired and got into service again. I repeatedly communicated with the War Department and with the War Shipping Administration in Washington and had been told to forget it, that if we couldn't do the job ourselves, they couldn't help us; that they were so busy in the States with new construction and the repair of combat and other craft more essential, that it was out of the question to take on any repair work for us, they couldn't do it here.

Q. What did you do with respect to the *Hortmar* when she arrived? A. We did the work ourselves with Army personnel. 584

Q. Will you outline for us what steps you took? A. We had had assigned to us some so-called Quartermaster battalions, which were battalions to be trained in stevedoring work in the islands after the campaign got under way. One of those battalions was newly arrived in Australia. I took a company from the Quartermaster battalion, gave them to Major Haggett, who was an experienced ship master and experienced in ship reconditioning and ship repair, and gave him the orders to go ahead and to get the ship in shape. So that we undertook the job with military supervision and military personnel out there. 585

Q. What materials did you have available to you to do the work? A. We had the wreck of an old ship and we had a scrap pile in the shipyard.

Q. Were reports made to you from time to time of the progress of the work? A. They were.

Q. Can you tell us in a general way what was done as the work progressed? A. We undertook to make the ship seaworthy, that is, to make her hull watertight, structurally strong, to take care of the bilge and ballast and pumping system, all of the things that would make the ship seaworthy but without any thought at all of restoring her to her pre-

vious condition or to class, just to get her back so she would float and could operate safely.

Q. Where was the work performed? A. At Brisbane mostly.

Q. Was some of it done at Sydney? A. Eventually she proceeded south under her own power for drydocking and some further work on drydock.

Q. Would you characterize the work that was done at Brisbane as work necessary to restore the vessel to class and commercial operating condition? A. No, sir.

587 Q. Will you tell us just how you would characterize that work? A. It was strictly a patch job, Mr. Smith, nevertheless to make the ship perfectly seaworthy, but without any thought at all of restoring the vessel to commercial operating condition. We took scrap plate, for example, and welded up hundreds and hundreds of shrapnel holes in her hull. No one would have accepted a repair job of that character but, nevertheless, it made the hull tight.

Q. After the patch job which you had done on the *Portmar* was completed, was the *Portmar* used again? A. Yes, sir, we put her into commission and used her.

Q. How long did you use her? A. We got two or three trips out of her. Then she was torpedoed and sunk with
588 the cargo.

Mr. Smith: I have no further questions.

Cross examination by Mr. Murphy:

Q. Colonel Plant, can you give us the date on which the *Portmar* was torpedoed and sunk? A. No, sir, I cannot, Mr. Murphy. I am sorry that I haven't got it.

Q. Can you make a rough approximation? A. 1943 because we got her in commission the very latter part of 1942 and she could easily have completed two or three voyages in the next mid year.

Q. You have told us that when you got to Australia, if I understood you correctly, the Japs were in possession of the Island of Tanimbar? A. Yes, sir.

Q. Do you know, and if you don't, tell us, when the Japs actually got possession of the Island of Tanimbar? A. No, sir, I do not know.

Q. Can you give us the date on which the tow of the *Portmar* began from Port Darwin towards Brisbane? A. I cannot, Mr. Murphy. I haven't checked it and I didn't get that date.

Q. I suggest to you that it was after the Battle of the Coral Sea. Would that agree with your recollection? A. It would.

Q. Are we to understand that even after—— . A. I 590
pointed out in explaining the chart to his Honor, Mr. Murphy, that from Torres Strait south, the Coral Sea area had been pretty well secured; Torres Strait to the westward, no.

Q. But even after the Battle of the Coral Sea, the Japanese still remained in control of the northern waters west of Torres Strait. A. They sent submarines into Sydney Harbor in July 1942—penetrated Sydney Harbor.

Q. According to your recollection was the Battle of the Coral Sea about the 4th to the 9th of May? A. Yes, sir.

Q. 1942? A. Yes, sir.

Q. Did I understand you to say that the crew that rode 591
the *Portmar* and men that handled the tugs were picked men? A. They were picked men.

Q. Were they military, naval or Army men? A. I can't say. I can't say, except that Captain Williams told me that he had picked a crew.

Q. The enterprise was considered a hazardous enterprise? A. It was, recognized from the beginning.

Cross examination by Mr. Mount:

Q. Colonel Plant, I have just two questions. When you arrived in Australia, do you know whether Captain Williams had already started the salvage of the *Portmar*? A. My answer is no because I arranged with him to actually

raise the vessel. He may have started on the salvage of the artillery, Mr. Mount, but not the ship.

Q. The arrangements for the salvage of the ship, you say— A. Were made by——

Q. —were made by you with Captain Williams? A. Made by me with Captain Williams. There were two operations. She had a lot of artillery aboard, which were urgently needed, and the Army arranged with Williams to get them out. During his removal of the guns he discovered that the ship could be raised. He came to see me and told
593 me that, and I told him to get the ship afloat.

Q. Did he say to you at any time that the master of the *Portmar* had said he was abandoning the ship? A. I can't recall that.

Mr. Mount: That is all.

The Court: I have just one question, Colonel. Can you tell me why the ship was brought around Cape York over to the east coast and why it wasn't brought down to some port on the west coast?

The Witness: For one thing, your Honor, there is nothing on the west coast, except the little port of Freemantle, where you come around on the Great
594 Australian Bight, and there is nothing further to the eastward until you come to Freemantle, and you have the Great Australian Bight to cross, which is one of the most tempestuous bodies of water in the world. So this (indicating) gave them plenty of cover, shelter, havens and everything else, and it brought us to the nearest——

The Court: The only course that was advisable to take was the course right through the enemy's waters?

The Witness: Yes, sir. In fact, they patrolled to the westward, so you didn't escape the enemy patrols whichever way you went.

The Court: You wouldn't have——

The Witness: You wouldn't have escaped them until you got away down the coast, but you could expect their subs and aircraft everywhere.

The Court: All along the west coast?

The Witness: Yes, sir, because they ultimately occupied all of the Dutch East Indies to and including Sumatra and dominated everything down the coast.

(Witness excused.

The Court: We will take a recess until a quarter to two. 596

(Recess until 1:45 p. m.)

AFTERNOON SESSION

HAROLD W. HAGGETT, called as a witness on behalf of Respondent United States of America, being first duly sworn, testified as follows:

Direct Examination By Mr. Smith: 597

Q: Captain Haggett, will you state your address? A. 554 Fifty-third Street, Brooklyn.

Q. Have you had any experience in the ship field? A. Since 1917.

Q. Will you outline briefly what your experience has been? A. Enlisted man in the Navy, 1917-19; I attended Government Navigation School and secured a third mate's license in January 1920: served as an officer until about January 1921. Ashore at various jobs until July of 1923, when I came with the American-Hawaiian Steamship.

Q. In what capacity did you serve the American-Hawaiian Steamship? A. Various grades of officer, including chief officer.

598 *Harold W. Haggett, for Respondent U. S. A.—Direct.*

Q. Did you do any shore work for them? A. Came ashore in April 1929, and stayed there until 1942, when I was taken into the Army.

Q. In what capacities did you serve ashore for the America-Hawaiian? A. Mostly in charge of loading and discharging operations, some reconditioning and repairing.

Q. Will you tell us something about the reconditioning and repairing work you did? A. Numerous minor jobs in the shipyards, and conditioning of the Ohioan, which was sunk in New York Harbor, raised and reconditioned,
599 the Texan, which was damaged in Port Newark, New Jersey, and was laid up for reconditioning.

Q. How extensive was the Ohioan job? A. Why, that was about a three-months job. She was sunk with a full cargo in New York Harbor, raised, cargo discharged, and replaced plates in the starboard side.

Q. What was the nature of the reconditioning of the Texan? A. The Texan was practically the same, replaced hull platings, things of that sort.

Q. Where was the work done in both cases? A. In the Ohioan, at 56th Street, Brooklyn; Texan, at Brewer's Drydock, Staten Island.

Q. When you went in the Army in 1942, what rank
600 did you acquire? A. I was commissioned a Major.

Q. What was your assignment? A. My first assignment was to go to Australia for further assignment there. I was assigned to the Water Transportation Corps in Melbourne.

Q. When did you arrive in Australia? A. About August 15, 1942.

Q. What was the first that you learned about the *Portmar*? A. Why, I saw her lying at Brisbane when we arrived there, but officially I didn't know anything about her until I had reported to Colonel Plant at Melbourne and was assigned to recondition the vessel.

Q. Where was the *Portmar* when you were assigned to recondition her? A. She was lying at Brisbane.

Q. Will you tell us something of what you did in connection with reconditioning the *Portmar*? A. We obtained the services of the 387th Port Battalion, one company, plus some mechanics from the different repair facilities in Brisbane, cleaned the vessel up, and overhauled the machinery sufficiently to get her running, patched the holes in the sides and superstructure, renewed the booms, rigging, where necessary.

Q. Well, now, when did you go aboard the *Portmar* in order to start reconditioning work? A. That was sometime early in September. 602

Q. Will you give us some statement of the condition of the *Portmar* at the time you went aboard her? A. At that time all the after quarters, 4 and 5 lower holds were covered with fuel oil, filth, and extended forward into the after end of No. 2 lower hold, as though all that part of the ship had been under water.

Q. Could you get any accurate idea of her condition at that time? A. No, we had to get her cleaned up before we could think what had to be done, outside of the visible damage such as the holes.

Q. Did you proceed with the cleaning work? A. Yes, we proceeded immediately with that. 603

Q. As you cleaned it up did you inspect the vessel from time to time? A. I was on the vessel constantly while the work was being carried out, making numerous inspections.

Q. Can you give us some idea of the nature and extent of the damage that you found on the *Portmar* as she was being cleaned up? A. Well, the most damage to the hull was numerous holes along the port side as far forward as No. 2 hatch, and the superstructure, stack, quarters, were holed in various places. The after holds had to be cleaned out, fuel oil; discharged cargo that had been left in the vessel; and refurnished the after quarters completely, after cleaning the fuel oil out of them and whitewashing them.

Q. What was the condition of the booms? A. We replaced several booms that had been badly holed by

machine-gun fire, and not being safe to use, others we left on the vessel.

Q. What was the condition of the deck machinery? A. The deck machinery was in very poor condition. We used compressed air during the cleaning process to hoist light loads, but when we got down to Sydney and tried to put a test on it, we found that a lot of cylinders and so forth were worn out and had to be repaired.

Q. What was the condition of the double-bottom tanks? A. The double-bottom tanks, particularly in Nos. 4 and 5,
605 were shaken and leaking badly along the margin plate. I had to put steel wedges and shims in before they could be caulked to be made tight.

Q. Captain, I hand you Libelant's Exhibit 47 and ask you if at my request you examined a copy of this survey report? A. Yes, I have seen a copy of it.

Q. Can you state how the condition of the *Portmar* as stated in that survey report accords with your recollection of the vessel from your inspection? A. Why, very similar to what we found when we started overhauling the ship.

Q. You think that survey report is substantially correct? A. I think so, yes.

606 Q. Captain, did you have occasion to inspect the *Portmar* in company with any surveyor from Lloyds? A. The Lloyds surveyor came aboard several times.

Q. Did you have any conversations with the Lloyds surveyor? A. I had several conversations but nothing official.

Q. Can you give us the substance of the conversations you had with Lloyd's surveyors?

Mr. Mount: Excuse me. May I qualify this witness's description of Lloyd's surveyor? Because, as Mr. Smith knows, there is a Lloyds Corporation, which is not the underwriting members of Lloyd's. I just want that clear. May I ask the witness that question?

Harold W. Haggett, for Respondent U. S. A.—Preliminary Cross. 607

Mr. Smith: Go right ahead.

Mr. Mount: When he said he conferred with Lloyd's surveyor——

The Court: Yes.

Mr. Mount: —the underwriters were not represented here.

The Court: Yes.

Preliminary cross examination by Mr. Mount:

Q. Let me ask you, Captain, when you speak about a 608
Lloyd's surveyor, you mean the surveyor of the Lloyds Corporation, don't you? A. Actually I don't know. He just represented himself as being from Lloyd's and I took him at his word.

Q. You don't know that he was the representative of the underwriting members of Lloyds? A. I don't know who he was other than the fact——

The Court: Do you dispute that the surveyor that participated in this survey, Libelant's Exhibit——

Mr. Smith: No, this is the American Bureau survey. There was a subsequent survey.

The Court: I thought you were referring to the 609
subsequent survey. You don't dispute that you participated——

Mr. Mount: No, not in the Sydney survey, but we did not participate in the Brisbane survey.

The Court: That is right.

Mr. Mount: There may have been a Lloyds surveyor at Brisbane, but that would be what is known as Lloyd's agent.

The Court: Not the agent?

Mr. Mount: Not the agent of the underwriters.

The Court: Not the agent of the underwriters in this suit.

Mr. Mount: That is it exactly.

610 *Harold W. Haggett, for Respondent U. S. A.—Direct.*

Direct examination continued by Mr. Smith:

Q. Captain, where did you talk with this Lloyds surveyor? A. On the vessel.

Q. Whereabouts was the vessel then? A. On deck.

Q. Where was the vessel located, in Brisbane? A. She was located in South Brisbane.

Q. Will you tell us the substance of your conversations with him?

The Court: How is this material? How am I to consider this?

611 Mr. Smith: I simply want to show that Lloyd's had notice they were never going to be asked to put this vessel back in class.

The Court: That is conceded in this case.

Mr. Mount: Yes.

The Court: Because it is not disputed there was a tender of abandonment here. There was a tender of abandonment and the tender was rejected.

Mr. Smith: The only thing I want to show, your Honor, and I don't want to labor the case at all, is that at the time the survey report, on which Mr. Mount relies, was made in Sydney, Lloyds had been

612 given notice that the repairs which the Army had in hand were not intended to put the vessel back in class, and that Lloyds would never be asked to class this vessel again for insurance purposes, so that they didn't have the need to see to it that the estimates they made as to the cost of putting the vessel back into class be as carefully made or as accurately made as they would as if they were going to be asked to reclass this vessel for insurance purposes.

The Court: There is no evidence in the case, nor is there any contention made by anybody, as I understand it, that Lloyds were asked to put this vessel back in class.

Mr. Smith: No, there is a statement in this subsequent survey, upon which Mr. Mount relies, that the cost of restoring this vessel to class would be so many Australian pounds. Now it is my contention that it has some bearing upon the weight to be given that statement to show that at the time the Lloyds survey was drawn, the people that drew it knew that the vessel was never going to be put back into class.

The Court: That would be admissible and I would receive it.

Mr. Murphy: No, it would not.

614

The Court: I understand Mr. Mount to claim that the surveyors to whom this witness spoke were not the same surveyors who made the survey in Sydney.

Mr. Murphy: He is right on that, but will your Honor let me say something?

The Court: Is that your contention?

Mr. Mount: Our contention is that we, all the underwriting members who are respondents, did appappoint a surveyor for the survey in Sydney——

Mr. Smith: But you also——

Mr. Mount: Wait a minute. —and we are bound by the findings on that survey. That was a joint survey, agreed by all sides.

615

The Court: I understand that, but Mr. Smith wants to show that those surveyors, having participated on behalf of Lloyds in the Brisbane survey, knew that it was never intended to restore this vessel to class and that, therefore, that knowledge influenced their appraisal of the damage that had been sustained. In other words, their appraisal was based not upon a complete restoration of the vessel, but just upon an appraisal to make it seaworthy, so it would float,

Mr. Mount: Well, then, he must try to impugn the honesty of the survey which was made in Sydney, which says specifically——

The Court: That is his purpose, as I understand it.

Mr. Murphy: Not the honesty.

Mr. Smith: Not the honesty but the quality, and the weight to be given to it.

Mr. Murphy: The weight.

Mr. Mount: Yes.

The Court: That is a nice way of saying it.

Mr. Mount: And if necessary, I may have to call a witness to show that Lloyds Corporation, which is
617 a classification society and has agents all around the world, is called in on matters where they don't represent the underwriting members of Lloyds.

The Court: Apparently all that Mr. Smith wants to show is that the surveyor who participated for Lloyds in the Brisbane survey had previous knowledge that it was not intended to reclassify this vessel. That is all you want to show?

Mr. Smith: That is all I want to show, what I intend to show by this witness.

The Court: Do you make a concession on that?

Mr. Mount: No.

The Court: Maybe we can get that concession.

618 Mr. Mount: Nobody appeared for the underwriting members of Lloyds on the Brisbane survey.

Mr. Murphy: I would like to look into that very point. There are so many documents in this case, and so many cablegrams. I cannot be sure of what I am saying. Now——

The Court: Unless you can show, Mr. Smith, that knowledge was actually conveyed to the surveyor who participated in the Brisbane survey on behalf of the underwriters in this case, I am not going to allow this.

Mr. Smith: Let me be heard on that a moment. Lloyds Underwriters do appoint surveyors generally. By that, they appoint certain surveyors who are

authorized to act for them and who will normally be selected to represent them in certain areas. In other words, it is a sort of a general appointment.

Mr. Mount: No proof of that.

Mr. Smith: Do you agree with that?

Mr. Mount: No, I don't agree with that.

The Court: He doesn't agree to it.

Do you claim that the same surveyors participated in both surveys, or that they were present?

Mr. Smith. I claim that people who represented themselves to represent Lloyds, were informed prior to the Sydney survey that this vessel was never going to be restored to class, and they were never going to be asked to class this vessel for insurance purposes again. 620

The Court: I will let you show that. What weight it is going to have with reference to the underwriters I don't know.

Mr. Smith: It may have none. I just want to show it.

The Court. I will let you pursue that line of interrogation.

Mr. Smith. I don't think it is fair to say—this witness had a conversation with a person who represented himself as representing Lloyds, and I want the substance of that conversation. 621

Mr. Mount. Not these underwriters.

Mr. Murphy: Mr. Mount is testifying on that point.

The Court: We will ask the witness.

Did you have a conversation with someone who represented Lloyds?

The Witness: I had a conversation with Mr. North, who said he was a Lloyds surveyor.

The Court: Who did he tell you he represented in connection with this ship?

622 *Harold W. Haggett, for Respondent U. S. A.—Direct.*

The Witness: He was interested in the Classification Society.

Mr. Mount: That is it. Perfectly clear.

The Court: He dosen't know he represented or acted on behalf of the surveyor——

Mr. Murphy: Of the underwriters.

The Witness: No.

Mr. Smith: Lloyds Classification Society.

The Witness: Yes.

Q. What was the substance of the conversation? A.
623 The substance was that I told him my instructions——

The Court: I don't think it is admissible now.

Mr. Smith: Well, the fact that the Classification Society was notified that it was not going to be put back into class is a fact which underwriters could very easily ascertain.

The Court: Yes, but unless it was brought to their attention, unless the surveyor who participated in Brisbane——

Mr. Smith: I think it is material.

The Court: I know it is material but you haven't
624 the proof. I am not ruling it out because of its immateriality. Objection sustained.

Q. Major, how would you characterize the work that was done on the *Portmar*? Was it work intended to restore the vessel to commercial operating condition in class? A. It was not, no.

Q. What were your orders with respect to the work you were to do in that connection? A. My orders were to do only what would permit the vessel to be operated in Australian waters during the war, minimum work to be required.

Q. How did you go about repairing the hull plating? A. Any holes in the hull were repaired by welding a patch over the hole.

The Court: Is there any dispute in this case but that this was just a patch-up job, was not a permanent job?

Mr. Mount: No, we don't dispute that.

The Court: You concede it was a patch-up job?

Mr. Mount: We concede some temporary repairs were made there.

The Court: And that the repairs were temporary—and that the nature of the repairs was temporary?

Mr. Mount: So far as we know. A good deal we 626
have heard this morning we have heard for the first time just as your Honor has.

Q. Major Haggett, based upon your experience in the reconditioning of vessels, have you formed an opinion as to whether or not the *Portmar* would have been worth repairing to the extent necessary to restore her to commercial operating condition in class at the time you were aboard her during this patch-up work, from the date you went aboard her in September until you completed the work? A. I would say, offhand, no.

The Court: On what fact do you base that 627
opinion?

The Witness: From the first fact that she was an old vessel, too slow.

The Court: Old? How old was it?

The Witness: I don't know the year she was built, your Honor, but it was about '21—after the first World War.

Mr. Murphy: That is in Libelant's Exhibit 1.

The Court: I am just testing the witness. You say it is slow. What made you say it was slow?

The Witness: Knowing that type of vessel, I know approximately what speed they usually make, around ten knots. I know, going down the coast

628 *Harold W. Haggett, for Respondent U. S. A.—Direct.*

from Brisbane to Sydney, we made about five knots with a fouled bottom.

The Court: What would the normal speed of a ship of that type be?

The Witness: About nine to ten knots, loaded, good condition.

The Court: On what other facts do you base that opinion?

The Witness: The fact of the amount of repair work to be undertaken to put the vessel in class, 629 renew plates, fittings, and things of that sort, renew houses.

The Court: What about that? What about the amount of repair work?

The Witness: Cost.

The Court: What about the cost?

The Witness: Well, I don't know what prices were on the coast, but the plates that were holed I assume would have to be renewed to put her back in class instead of being patched up. Her houses were badly wracked, and would have to be practically rebuilt—wooden houses. Boat deck would have to have been renewed; we covered it with canvas to 630 keep the rain out. The masts——

The Court: You mean as a business proposition you would feel unjustified, not warranted, from a business standpoint, in incurring the expense necessary to make the necessary repairs on this ship?

The Witness: Yes, sir.

The Court: (Continuing) When viewed in the light of the value of the ship after the repairs had been made.

The Witness: In view of the fact that when she was—if she was thoroughly repaired, she would still be an old and obsolete ship, too slow ship.

631

Cross examination by Mr. Murphy:

Q. You didn't mention anything about damage on the navigating bridge. Did you note any damage on the navigating bridge? A. Well, the wheelhouse was badly wracked.

Q. What do you mean by wracked? A. Out of line, the sheathing was pulled away, and the compasses were gone.

Q. By "gone" you mean, was there anything left of them at all? A. No, sir.

Q. Nothing left? A. No, sir.

Q. Did you see any evidence of what kind of damage had caused that? A. Why, the only evidence that I ever— 632
outside of bullet holes, was probably caused by concussion, but I don't know, I wasn't there.

Mr. Murphy: Nothing further, your Honor.

Cross examination by Mr. Mount:

Q. Captain, the replacement of plates and so forth, that you testified to, I understood from another witness those were from a scrap pile? A. Why, pieces, of course, I don't know where they actually came from. I understood they came from Evans-Bacon Shipyard scrap pile, that is, patches welded over the holes.

633

Q. Isn't it true that everything that you did— A. Practically.

Q. —in the way of temporary repairs— A. That is true.

Q. —was with material from the scrap pile? A. And we also took a lot of material from a Liberty ship that had been grounded at the mouth of the river and broken in two. We replaced a good part of the steel with that.

Q. She had become scrap? A. She was broken in two, when I saw her.

Q. During this time that temporary repairs were being made at Brisbane, did the Army have exclusive control of the vessel? A. Yes, sir.

Mr. Mount: That is all.

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By Mr. Murphy:

Q. May I ask one more question. Do you remember the name of that surveyor from Lloyds? A. Mr. North.

Q. N-o-r-t-h? A. I assume so.

Q. Do you remember his initials were James E.? A. I really don't.

Q. Was that scrap pile that you mentioned in Brisbane, that shipyard scrap pile? A. Yes, everything we got was——

Q. Was in Brisbane? A. (Continuing) Right in Bris-
635 bane.

Mr. Murphy: That is all, thank you.

(Witness excused.)

CHARLES B. YULE, called as a witness on behalf of the Respondent United States of America, being first duly sworn, testified as follows:

Direct examination by Mr. Smith:

Q. Will you state your address, Mr. Yule? A. 9300
636 Flower Avenue, Silver Springs, Maryland.

Q. Mr. Yule, are you a marine surveyor? A. Yes, sir.

Q. By whom are you now employed? A. Well, change the name too often. It is the Federal Maritime Board. It used to be the Maritime Commission.

Q. When did you first go with the Maritime Commission? A. In 1940.

Q. Will you state what assignment you had with the Maritime Commission and its successors from that date to the present time? A. Yes, sir, I was assigned to the Baltimore office in charge of all repairs of all American and Lend Lease ships. And then I went back to Washington on the 25th of June 1942 as Superintendent Engineer for the Division of Operations. And then I came up to New York as

local manager for Maintenance and Repair in 1937, and then I went back to Washington as technical adviser to the legal department. I am still there.

Q. You said 1937. You meant 1947, isn't that correct? A. 1947, yes.

Q. Will you tell us something of your training and experience prior to the time you joined the Maritime Commission? A. Yes, sir. I served my apprenticeship in the Fore River Shipyards, Bethlehem Steel now, 1914 to 1918. I went into the Navy and I came out after the first World War.

638

I got my chief engineer's license in 1921 and I served as chief engineer for seven years.

I was taken ashore and made Port Engineer for the company. That was in 1927. I stayed there until 1930 when I was appointed Resident Surveyor for the United States Salvage Association at Galveston. I stayed there until 1934. The depression came along; they closed the office.

I went to work as superintendent, outside superintendent for the Harrisburg Machine Works in Houston until 1937.

I then went back to sea with The Texas Company until 1940, and I came up here in 1940 and I have been here since.

639

Q. During the war years did you have any occasion to deal with vessels that had been torpedoed and stranded? A. Yes, sir; I had charge of the foreign repairs and salvage, which included—my part of it was the Mediterranean and Atlantic.

Q. Will you tell us something about your duties in that connection? A. We had engineers located all around the world, and if a ship got into trouble, if it was in my area, I would get a cable from the engineer in that area, and I would instruct him to go ahead and do what I thought was necessary to salvage the vessel, or sell her, or what I thought was the best.

Q. You would make the arrangement either to salvage the vessel or dispose of it? A. Yes.

Q. The salvage officer would report to you? A. No, the engineer reported to me.

Q. Did you at my request examine this survey report, Libelant's Exhibit 47? A. American Bureau—yes, sir. Oh, yes, sir, I did.

Q. Did you also examine some other material with with respect to the SS. *Portmar* that I furnished you? A. Yes. If I remember, you asked me to come up with an overall cost to bring the ship back to the States. Is that what you meant?

641 Q. I furnished you some information as to the position and location of the *Portmar* in Australia? A. Yes.

Q. Somewhere in 1942? A. Yes.

Q. Is that correct? A. Yes. When I first got into this *Portmar* case I was told the ship had been damaged by enemy action at Darwin, Australia, and I worked up an estimated cost to bring the ship to the States and repair her as she was before the damage.

Mr. Mount: Your Honor, we have a joint survey that was made.

The Court: Let us find out upon what facts he has based his estimate. Maybe he has based his estimate upon that joint survey, I don't know.

642 Mr. Mount: All right.

The Court: We will find out. That will be the next question, I assume.

Q. Mr. Yule, I ask you to assume that the SS. *Portmar*, having the characteristics shown in Libelant's Exhibit 1——

The Court: What do you want to do with this witness next? Do you want to prove by him an estimate——

Mr. Smith: Based upon the survey report of the American Bureau——

The Court: Give me a chance.

Mr. Smith: Surely.

The Court: You want to get from him his expert opinion on the cost of repairs based upon the condition of the ship as revealed by what?

Mr. Smith: By the American Bureau survey at Brisbane, which Captain Haggett has testified accorded with his recollection.

The Court: Ask him that question and save time. I don't like these hypothetical questions.

Q. In your opinion, Captain, what would be the cost of effecting the repairs on the SS. *Portmar* in the United States called for in the survey report, Libelant's Exhibit 47? 644

The Court: Assuming that the damages were as outlined in this survey, Libelant's Exhibit 47, what in your opinion would be the cost of bringing the vessel to a port on the West Coast of the United States and making the repairs of the damage that is contained in this survey of this ship?

The Witness: $234,825.

Q. That would be the cost of repairs, is that correct? A. That is correct.

The Court: Two hundred—— 645

The Witness: $234,825.

The Court: The witness has in his hand what appears to be an itemized statement showing how he arrived at that sum. Do you offer it in evidence?

Mr. Smith: I offer it in evidence.

The Court: I will receive it in evidence.

(Marked Respondents' Exhibit U.S.A. F in evidence.)

Q. Is that sum which you just stated the sum which it would cost to repair the vessel or the total of the sum that it would cost to repair the vessel and bring her to the States? A. Oh, no. If this is correct——

The Court: If what is correct? Let's see.

The Witness: If this survey is correct——

The Court: Referring to Libelant's Exhibit 47.

A. (Continuing) If that is the complete picture, the $234,825 would be what I estimate it would cost in the States, ten per cent one way or the other, to put the ship back in class. On top of that——

Q. Do you mean——

The Court: Wait. Let him finish.

647

A. On top of that you have got, if there were no facilities in Brisbane or Australia, or in that area, you would have to hire a tug. The tug hire would cost you approximately $1,500 a day, at a speed of five or six knots, from Brisbane to San Francisco, San Diego, or Seattle, and you have to send the ship, I mean the tug, back; or, if you brought the boat from the States, you still would have to send it over.

The Court: A round trip of a seagoing tug?

The Witness: That is right.

The Court: How many days' charge, approximately?

648 The Witness: I think it is 7,000 miles. I estimate it is 6,300 miles on the Great Circle, but at that time, during the submarine-airplane headaches, you would have to make a 700-mile detour to come up the South American Coast. So it would be about 7,000 miles at, oh, five knots.

Q. Have you estimated how long it would take? A. I think it was 59 days. I am not just——

Q. Are these pencil notes that you made? A. Oh, yes, this is mine.

Q. Do they refresh your recollection? A. That is right.

Q. How many days? A. 58 days. That is the tow days. Then there is 29 days light; a total of 87 days at $1,500 a day, is——

The Court: 29 days what?

The Witness: 89 days.

The Court: 29 days what?

The Witness: 89.

Mr. Mount: Light, without the tow.

The Witness: No, the round trip of the tug.

The Court: Going back alone?

The Witness: Bringing the ship home and going back.

The Court: Yes.

The Witness: At $1,500 a day would be $131,000. 650

Q. Would there be other expenses in towing the vessel back? A. Yes.

Q. What would they be? A. War risk insurance at that time, basing—as I understand it—on the stipulated price of the vessel, $688,000, would, at 1½ per cent war risk insurance, 1½ per cent marine risk, plus $5,000 P and I insurance, would bring that insurance up to about somewhere around $19,000, I think.

The Court: How much for the tug hire, did you figure that? How much would your tug hire figure?

The Witness: The tug hire is $131,000. 651

The Court: Your insurance, you figure, $19,000, $20,000, all right.

Q. Have you got an exact figure for the insurance? A. Sir?

Q. Have you got a figure for the insurance? A. I have it here but I can't find it.

The Court: Nineteen or twenty thousand. What other expenses?

The Witness: Now, you have a crew of 15 men which, regardless of which way you hire them, in Australia or the States, you have to bring them over and send them back, or you have to send them over

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and you have get to bring them back, that will run about $17,000, $18,000.

Q. Does that include subsistence for the men and their wages and so forth? A. That is right.

Q. What other expenses would be incurred? Do you have the installing of bridles and the like on the ship? A. Oh, yes, I forgot about that, and to get the ship ready you have got to put a couple of insurance hawsers aboard, inch and a quarter steel wire, and get a thousand or fifteen hundred fathoms of manila rope, 9-inch, which would, 653 roughly estimated, be around $3,000 to get her ready.

Q. Are there any other expenses that would be incurred in getting her from Australia to the United States? A. No, I think——

The Court: What is the sum total of this?

Mr. Smith: There is one other item I want to discuss.

The Court: Excuse me.

Q. I asked you to assume that the vessel was sunk in Darwin and raised by the use of centrifugal pumps, and then towed around from Darwin back to Brisbane by two 654 tugs and a riding crew of salvors. I ask you whether you have made any estimate of the cost of doing that work.

Mr. Mount: Your Honor, I object to that question. I know there has been no evidence of any bill or charge by the people who did that towing.

The Court: I think we are getting a little far afield on that.

Mr. Mount: I object to the question.

The Court: Yes, all right.

Mr. Smith: The work was done.

The Court: I know, but this witness doesn't know the conditions at the time. He is an expert in what it would cost to bring the ship over and what it would

cost to make repairs here, or on the West Coast. He is not an expert as to what the reasonable charge would be for the perilous trip around the Cape, bringing it in. He doesn't know anything about that —at least I don't think he does. Do you?

The Witness: No, I will go along with you on that. I mean—excuse me.

The Court: That is all right. We understand each other. You are right.

The Witness: After all——

The Court: You don't know "from nothing" about that part of the world. 656

Q. What is the total of the towage and repair expense?

The Court: Let us get the towage separately. What would it cost to bring that ship over?

The Witness: It would cost you about $170,000 to deliver the ship in the States.

Q. What is the total of the two? A. Four hundred—you mean repairing and bringing her? About $470,000.

Q. Are you sure of that?

The Court: He is off on his figures but it is a matter of mathematics. 657

The Court: No, it is $235,000 plus $170,000.

Q. About four hundred——

The Court: Four hundred and five thousand, four hundred and ten thousand.

The Witness: $453,000.

Mr. Murphy: What did he say?

The Witness: $453,000.

The Court: What items make up that four hundred and fifty. Just give us the sum total, Mr. Witness, of the large items.

The Witness: The towage, $131,000; repairs, $235,000—oh, I forgot this one, 76 days at $11,400 for the crew.

658 The Court: You told us that, about seventeen or eighteen thousand.

The Witness: $6,750 for return transportation, $5,000—oh, $18,600 for insurance, $3,000 to get her ready, and the total is $171,060. That is not including the towage. The towage is $131,000.

Q. Have you had any experience in arranging for salvage of vessels stranded in areas subject to enemy attack? A. Well, my——

659 Mr. Mount: Your Honor, I haven't made many objections because I wanted all the facts it was possible to get before you, but I think this——

The Court: Let us see what experience he has had. Maybe he will tell us he has had none. We will find out. Let him answer.

Mr. Mount: It is in Australia.

The Court: We will find out.

The Witness: No, not in Australia.

The Court: Not in the southwest Pacific?

The Witness: No, sir.

Mr. Smith: Leave it out.

660 The Court: Forget it.

Mr. Smith: That is all.

Mr. Murphy: I just want to ask one question.

Cross examination by Mr. Murphy:

Q. Your total estimate there did not include anything with respect to the cost of moving the ship from Port Darwin around to Brisbane? A. No, sir.

Q. You start at Brisbane? A. My estimate was directly from Port Darwin to San Francisco.

Q. Oh, directly from Port Darwin to San Francisco? A. You cannot make two jobs of it. You have——

Q. All right, Port Darwin to San Francisco? A. Yes, or Seattle.

Mr. Mount: I have just two questions.

Cross examination by Mr. Mount:

Q. You do know that labor was cheaper in Australia than in the United States in 1942? A. Yes, sir, and Mr. Zubach was our engineer out there, and he told me that—bad luck, of course, that materials had to be brought to Australia—you could get labor for ten cents a dozen, or something of that nature, but the over-all picture there wasn't too much different between the cost of an American job and an Australian job. You got a cheaper price on labor but your materials were higher. Where we paid eight or nine or ten dollars a day for a machinist in the States——

The Court: A what for a machinist?

The Witness: Not today. In 1942. You got them for eight or nine or ten dollars a day, but out in Australia you would get them for four dollars and a half. We paid 45 and 50 cents a pound for plating. Down there you would have to drag it all the way from the States to Australia and it would cost you a dollar a pound.

Q. You don't know about the actual repairs that were made to the *Portmar* in Australia? A. No, sir.

Q. And you heard Colonel Plant testify that they needed the *Portmar* so badly that they used her, after the repairs, on several voyages for the Army before she was sunk? A. That is right.

Mr. Smith: No further questions.

(Witness excused.)

Mr. Smith: I rest.

Mr. Murphy: Before Mr. Smith rests, if the Court please, I wish to ask him if he is going to put in any evidence of what the actual cash expenditures were——

Mr. Smith: I am sorry.

Mr. Murphy: —of towing the vessel from Port Darwin to Brisbane, because he has the information.

Mr. Smith: Mr. Davis, will you take the stand?

The Court: Maybe we will have a concession on that instead of a lot of testimony.

Mr. Smith: That is——

The Court: How much it cost to tow this——

Mr. Murphy: What was the actual cost?

The Court: —from Port Darwin to Brisbane? What is your figure? Show it to Mr. Mount. He might concede that you spent that much.

Mr. Mount: I don't.

Mr. Smith: Spent about 17,000 Australian pounds.

Mr. Murphy: 17,973 Australian pounds.

Mr. Mount: We have never heard of any bill being made or paid.

The Court: Show it to Mr. Mount. Maybe we can save time.

Mr. Mount: And we do know of a lot of work in other cases done by the Australian Government under reverse lend-lease.

Mr. Murphy: That is not evidence.

Mr. Mount: I know it isn't.

The Court: It isn't, and Mr. Mount doesn't mean it.

Mr. Mount: But I would like to have this proved.

Mr. Smith: This is the only thing we have on it.

The Court: Show it——

Mr. Smith: I think that we have proof what it was. I think that Mr. Yule could give an estimate of the cost, but if you don't think that that would be appropriate, we have——

The Court: We will have a stipulation that you spent so much and that it was a fair amount.

667

Mr. Mount: There is nothing that shows that there was any bill paid for towing from Port Darwin to Brisbane.

Mr. Smith: The situation is, Mr. Mount, the Army——

Mr. Murphy: If the Court please——

The Court: Everybody is talking. Can we get together on a stipulation?

Mr. Smith: I will state my understanding of the facts. If anybody wants to stipulate, that is fine.

The Court: Suppose we take a five-minute recess? We will go inside and see if we can stipulate the facts. If we cannot, we will come out and take testimony.

668

(The following occurred in chambers):

Mr. Smith: It is stipulated and agreed that the reasonable cost of the services and equipment furnished the *Portmar* by the Commonwealth Salvage Board in raising her and getting her from Port Darwin to Brisbane was $55,130.

The Court: Is that agreeable, Mr. Murphy?

Mr. Murphy: It is, your Honor.

669

The Court: You agree?

Mr. Mount: Yes, that is agreed.

I do want something from you that was actually paid.

Mr. Smith: Yes, I will try to get it.

It is further stipulated and agreed that the saving effected by the owner during the period from February 19, 1942 until November 17, 1942, by reason of the breakdown of the *Portmar*, for charter purposes, was $92,220.

Mr. Murphy: For charter hire purposes.

Mr. Smith: For charter hire purposes.

Mr. Murphy: For purposes of charter hire was——

Mr. Smith: $92,220.

Mr. Murphy: That is agreed, your Honor.

The Court: I don't know how that will affect Mr. Mount.

Mr. Murphy: Only in so far as——

The Court: Only as he comes in as subrogee. Do you consent to that?

Mr. Mount: If Calmar Steamship says that is what was saved, that is good enough for me.

Mr. Groom: We say it.

The Court: And the Government rests?

Mr. Smith: Government rests.

The Court: We will now hear the underwriters.

Mr. Mount: We offer in evidence deposition of Roy J. M. Merrett, taken here in New York on July 26, 1949.

The Court: Who was Roy Merrett?

Mr. Mount: He was one of the Lloyds underwriters.

Mr. Murphy: As a matter of fact it appears he was the leading underwriter on this risk.

If the Court please, I press the objections which are recorded in this deposition. I also object, your Honor, to the testimony of Mr. Merrett, in so far as he estimates additional premium, on the following grounds, first, the provision for additional premium in the held covered clause does not apply to this case because there was no deviation or change of voyage within the meaning of the held covered clause and, therefore, no additional premium is due.

I further object to the receipt of Mr. Merrett's opinions on the ground that such opinions are not entitled to any weight because Mr. Merrett is the leading underwriter in this risk, is interested in the result of the case, and his opinions are based on hindsight rather than on the true test of the premium which would have been charged for a policy which

would have covered the passage from Port Darwin to Timor under the circumstances shown by this case.

The Court: That last objection seems to me to go to the weight.

Mr. Murphy: Yes, your Honor.

The Court: The weight of his testimony and the weight of his opinion. I am going to overrule your objection at this time and receive the deposition in evidence. If, after my consideration of the case and after reading the evidence and the depositions which were offered by you, I come to the conclusion that 674
your objection is well founded, I will indicate that in my opinion and will rule then and exclude these depositions, but at the present time your objection is overruled and they are received in evidence.

(Marked Respondent Underwriter's Exhibit 1 in evidence.)

Mr. Mount: We also offer in evidence the testimony given under commission to London, covering the testimony of Arthur James Whittall, covering the testimony given by Robert Hutchings Whittall, Noel R. Jenkins, Albert William Theoabold, Leslie Kingdon Sweet, George Christopher Bedwell, and Harold 675
M. Mummery, who are underwriters in the London market, on the question of additional premium if the Court holds there was a change of voyage and that the insurance was still in force.

Mr. Murphy: I object to the introduction of the testimony of the witnesses named by Mr. Mount, taken under commission to London, on the same grounds that I stated as the basis of my objection to the deposition of Mr. Merrett.

I also wish to point out that one of these witnesses is actually personally interested as an underwriter. I believe that was Mr.—his name I will point out in my brief. The others are all associated with

companies who are interested in the outcome of this case by reason of their participation in the insurance on the policies.

I stress the point that the held covered clause does not apply, and I reiterate my objections as stated in my opposition to Mr. Merrett's deposition.

The Court: My ruling on these depositions is the same as on the Merrett deposition. Your objection with respect to their interest in the outcome, at this time, goes to the weight given to their testimony rather than to its admissibility. I am going to 677 receive these depositions at this time. If I hold that the held covered clause is not applicable to the facts in this case, I will indicate it in my decision and will exclude these depositions.

(Marked Respondent Underwriters' Exhibit 2.)

Mr. Murphy: I now offer in evidence—will you permit me—since you have offered only the direct—I offer in evidence the answers of these same witnesses, taken under commission to London, to cross-interrogatories propounded by proctors for libelant.

Mr. Hall: We offered it all.

678 Mr. Murphy: I didn't understand you did.

Mr. Hall: We offered it all.

Mr. Murphy: In that event my offer is not necessary.

The Court: You have only two witnesses to produce?

Mr. Mount: I have three witnesses. Perhaps I ought to explain to your Honor that I am calling these three witnesses to show that this rider, the warranted free of capture, was a provision which was adopted in 1940 and was known in the market. My third witness is Mr. William D. Winter, who is the leading American authority on marine insurance, and who has written a standard book on marine

insurance, and I am going to ask him what was the understanding of that clause in the marine insurance market.

The Court: Well, as I indicated to you in your opening, I don't think this testimony should be considered by the Court unless I find an ambiguity present in the clause in the policy. If I find that the language used in this particular clause in the policy is clear and definite in terms and not ambiguous, I don't feel this testimony is admissible or will be accepted or will be considered by the Court.

Mr. Mount: You have to make the final decision. 680

The Court: I will take it now and I will also indicate in my decision as to whether or not I find this clause, free of capture clause, ambiguous or indefinite in terms. If I find it is not ambiguous or indefinite in its terms, I will not consider this testimony as to the intention of the underwriters and of the insured.

Mr. Mount: My three witnesses, of course, have no connection with this case.

The Court: All right, I will take it.

Mr. Mount: They all come——

The Court: I will take the testimony from these three witnesses, then, under that ruling. 681

Mr. Mount: They all come under subpoena. Are you willing to agree that Mather proffered this rider?

Mr. Murphy: I don't think much of your word "proffered." I am willing to agree that Mather took the regular outstanding American Institute of Marine Underwriters clauses then in effect and sent them to Stephens to be attached to the policy to be issued; and I am also going to show that they used those same clauses in many other risks which were placed by Mather through Stephens with Lloyds Underwriters at the same time, that those clauses were

familiar to Lloyds Underwriters, and I am also going to show——

The Court: Maybe it will be conceded.

Mr. Murphy: I think it may be. And I also point out that this form of insurance was required by the charter terms of the *Portmar*. Will you agree to those things?

Mr. Mount: You have already done that. You have put in Ogden's letter saying that they were satisfactory.

683 Mr. Murphy: All right. That will be my position.

The Court: So there is no dispute, is that agreed——

Mr. Murphy: Is that agreed?

The Court: —that this free of capture clause——

Mr. Murphy: Rider.

The Court: —rider, was a rider in common usage?

Mr. Mount: Yes.

The Court: And that its terms were familiar to the underwriters, is that correct?

Mr. Mount: Yes.

The Court: And that it had been used in other policies written by these same underwriters?

684 Mr. Mount: That I don't know.

Mr. Murphy: That is what Mr. Grotefend of Mather will testify if I call him, that he used the same clauses on many other war risks placed with Lloyds Underwriters.

The Court: Who is that in Mather's office?

Mr. Murphy: Grotefend.

Mr. Mount: Is he here in New York?

Mr. Murphy: He is in court today, and he will testify he used this same form of insurance in other war risks with Lloyds Underwriters through Stephens at the same time or the same period and that Lloyds were fully familiar with it. It is the

standard American Institute of Marine Underwriters clause.

The Court: Will it be necessary to call this man from Mather's, or will it be conceded that if he were so called, he would so testify?

Mr. Mount: I think maybe you had better put him on.

(The following occurred in the courtroom:)

Mr. Smith: May I have leave to substitute a photostat of this exhibit of Mr. Yule's? 686

The Court: Yes. What I was going to propose, as indicated before, at the close of the evidence, all sides will take their own exhibits and submit the exhibits, or photostats of them, at the time you submit your final briefs. I don't want to be entrusted with the care of the exhibits.

STANLEY DONALD LIVINGSTON, called as a witness on behalf of the respondent Underwriters, being first duly sworn, testified as follows: 687

Direct examination by Mr. Mount:

Q. Mr. Livingston, what is your present position? A. I am secretary of the American Marine Hull Insurance Syndicate.

Q. How long have you been secretary of the Syndicate? A. I would say about five years.

Q. Will you describe what the American Marine Hull Insurance Syndicate is? A. The Syndicate is an organization of about eighty companies at present, which were banded together to form a strong and adequate American market for the insurance of vessels.

688 *S. D. Livingston, for Respondent Underwriters—Direct.*

Q. Do those companies act as a unit in accepting insurance? A. Yes, they do.

Q. You have appeared today as a result of a subpoena? A. Yes, sir.

Q. Are Mendes & Mount attorneys for the Syndicate? A. Not that I know of.

Q. In the Syndicate, I suppose, you have several committees? A. We have numerous standing committees and special committees.

Q. Is one of those committees the Policy Forms Committee?
689 A. Yes.

Q. In reply to the subpoena *duces tecum* that was served on you, have you—by the way, who was the secretary of the Syndicate in 1940? A. Mr. Norman S. Adams, since deceased.

Q. Was he secretary in both 1939 and 1940? A. Yes.

Q. In response to the subpoena have you produced a letter from Mr. D. C. Anderson, to your Policy Forms Committee, dated January 12, 1940? A. Yes, I have it with me.

Q. You have it there? A. Yes.

Mr. Mount: I should like to offer that letter in
690 evidence. It deals with the clause——

The Court: Deals with the what?

Mr. Mount: It deals with the rider which is involved in the policies in suit here—at least the words.

The Court: What particular rider?

Mr. Mount: The rider which starts "Notwithstanding anything to the contrary contained in this policy"——

The Court: That is the "free of capture" rider?

Mr. Mount: The free of capture rider.

Mr. Murphy: I have no objection.

Mr. Mount: I offer this letter in evidence.

Mr. Smith: I object to it as incompetent, irrelevant and immaterial.

Mr. Murphy: As to its materiality and relevancy I object, but I have no objection to the form of the proof.

The Court: I understand Mr. Smith has no objection to the form of the proof.

Mr. Smith: That is right.

The Court: But as to its materiality or its——

Mr. Mount: It is offered, your Honor, for the purpose of showing how the clause originated and that it was a market clause.

The Court: Yes. As I indicated to you gentlemen before, I will receive it in evidence. I don't know whether I will consider it or not in reaching my final determination. I will not consider it unless I find that it becomes necessary to inquire into the intent of the parties. 692

Mr. Mount: Right, correct.

(Marked Respondent Underwriters Exhibit 3.)

Q. Is that the original? A. No, it is a certified copy.

Mr. Mount: Is that satisfactory?

Mr. Smith: That is satisfactory. No objection to the form. 693

The Court: No objection as to its accuracy or as to the form of proof. The objection is as to its relevancy and materiality.

Mr. Murphy: If the Court please, I would like to add, subject to check as to the accuracy. I have just glanced over it.

Mr. Mount: That is understood.

The Court: If it is not accurate in substance, call it to Mr. Mount's attention and I know he will substitute a correct statement.

Q. Mr. Livingston, in response to the subpoena have you brought the minutes of the meeting of the managers of the Syndicate, meeting of January 18, 1940? A. I have brought

694 *S. D. Livingston, for Respondent Underwriters—Direct.*

an extract of those minutes dealing with the particular phase of the minutes——

Q. Have you the whole minutes there? A. I have them, if the Court would like to see them, but I would prefer not to leave the whole thing here. We have an extract that is certified. I took a deposition here, certified. Deponent states that the only pertinent parts of the minutes of that meeting relating to the f. c. and s. clause is the portion which has been given above in quotation.

Mr. Mount: I should like to show the whole
695 minutes to my opponents.

The Court: But you offer in evidence the extract?

Mr. Mount: I offer in evidence the extract.

The Court: And we will receive this. There is objection made as to its relevancy and materiality. The objections are overruled. The extract is received in evidence on the same ruling as applied to the preceding exhibits.

Mr. Murphy: I would like to add, if your Honor please, if I may, that the statement of the witness was that the minutes relates to the f. c. and s. clause. We are not now discussing the f. c. and s. clause.

696 The Court: Maybe the witness improperly described the clause. Instead of free of capture clause, he referred to it as free of capture and seizure.

Mr. Murphy: But there is a free of capture and seizure clause embodied in the basic form. This is a rider——

The Court: Is that what you intended, that these minutes refer to the rider?

The Witness: Yes.

The Court: Rather than the body of the policy?

The Witness: Yes.

Mr. Murphy: You don't mean f. c. and s. clause, as we conventionally understand it?

The Witness: No, the rider.

Mr. Murphy: You mean the rider——

The Witness: Rider that was used in connection with the f. c. and s. clause.

Mr. Murphy: Sometimes called the British capture clause.

The Witness: That is what I understand.

The Court: It is a modification we had in the Worthington case?

Mr. Murphy: No, sir, this rider was not involved in the Worthington case. The f. c. and s. clause was.

The Court: Off the record.

(Discussion off the record.) 698

Mr. Murphy: No objection to the form of proof, your Honor.

Mr. Smith: I have none, either.

Mr. Murphy: Reserving all other objection.

Mr. Smith: You have already noted our objections.

The Court: Yes, you object to its relevancy and materiality.

(Marked Respondent Underwriters' Exhibit 4.)

Mr. Mount: I hand you back the original. That is all, your Honor. 699

The Court: Any cross-examination?

Mr. Smith: None by the Government.

Mr. Murphy: None.

(Witness excused.)

The Court: Next witness.

Mr. Mount: I should have asked the witness if his Syndicate had any financial interest in this case.

Mr. Murphy: Conceded——

The Court: Conceded the Syndicate has no financial interest. Is that conceded?

Mr. Smith: Conceded.

Mr. Murphy: Conceded.

700 *Ernest G. Driver, for Respondent Underwriters—Direct.*

ERNEST G. DRIVER, called as a witness on behalf of the Respondent Underwriters being first duly sworn, testified as follows:

Direct examination by Mr. Mount:

Q. Mr. Driver, what is your present position? A. Secretary, American Institute of Marine Underwriters.

Q. Will you describe what that group is? A. The American Institute of Marine Underwriters is an organization—a membership association of marine underwriters
701 in the United States.

Q. Is it a voluntary organization? A. It is a voluntary organization, yes, sir.

Q. How many members has it? A. At the present time I would say approximately 135 members, company members.

Q. Are they all companies or some individuals? A. Companies are represented by individual underwriters. It is a part of the membership.

Q. In 1939 and 1940 were you secretary of the American Institute of Marine Underwriters? A. Yes, sir.

Q. You are here today as the result of a supboena? A.
702 Yes, sir.

Q. Are Mendes & Mount attorneys for the institute? A. No, sir.

Q. Has the institute any financial interest in this litigation? A. Not to my knowledge, sir.

Q. The Institute has several committees? A. Standing and special committees, yes, sir.

Q. Is one of those committees what you call the Forms and Clauses Committee? A. Yes, sir.

Q. What are the functions of that committee? A. From time to time it issues recommended forms and clauses for the use of its member companies. Recommended forms only.

Q. That is, recommended by that committee? A. That is right.

Q. When clauses are recommended by that committee, does the Institute publish those clauses? A. They are published, yes.

Q. By whom are they published? A. The printer is Joseph Lazard. I haven't his address but it is in New York City.

Q. He does all the printing of the clauses that are approved by the American Institute of Marine Underwriters? A. Recommended by the American Institute of Marine Underwriters, yes.

Q. He publishes a book, does he? A. Yes, he does. 704

Q. And in addition to the book does he have a reference by which the subscribers to the book are kept up to date with clauses subsequent to the publication of his book? A. That is my understanding, yes.

Q. In addition to the publishing in the book, is there any publicity which the Institute makes to its own members? A. Yes, by form of bulletin.

Q. In response to the supboena, have you produced a letter of July 18, 1940, to the members of the American Institute referring to the free of capture clause? A. I have that copy.

Q. Is this the original? A. There is no original. It is a copy. They are all copies of bulletins. 705

Q. Was this obtained from your own records? A. From my own records, yes, sir.

Mr. Mount: Your Honor, this refers to a free of capture clause which has to do with cargo and which is referred to in the minutes of the meeting where they did the same thing with respect to hull. The only reason for introducing it is because in the minutes of the meeting dealing with the hull, they refer to what had been done with respect to cargo. So that the thing needs that explanation.

The Court: I don't see its relevancy or materiality, even if there is an ambiguity, but I am not pre-

706 *Ernest G. Driver, for Respondent Underwriters—Direct.*

pared to finally pass on it at this time because I haven't studied the policy, and I haven't examined it or read the riders. So we will deem an objection made by the libelant and by the Government as to its reception because of its immateriality or irrelevancy. The objection is overruled at this time and I will receive it in evidence and if I determine to disregard it, I will comment on that in my final decision.

Mr. Mount: I offer this letter which has just been
707 referred to by the witness, in evidence, letter of July 18, 1940.

(Marked Respondent Underwriters Exhibit 5.)

Mr. Murphy: Will counsel supply us and the Government—

Mr. Mount: Yes.

Mr. Murphy: —with copies of these?

Q. Have you copies? A. I think I have a few extra copies.

The Court: Mr. Mount, I don't know whether
708 you were here when I indicated before that at the end of the trial each counsel will take his own exhibits and they will be made available by counsel for the inspection of other counsel, and the exhibits, not originals, but photostats, will be submitted by each counsel with the final briefs and proposed findings.

Mr. Murphy: Have you a copy of the one you put under Mr. Livingston's testimony?

Mr. Mount: If I haven't, I will get you one.

Q. Attached to this letter, Underwriters' Exhibit 5, there are some enclosures. Will you state what they are? A. They are referred to in the bulletin, sir. They are identified in that bulletin. If you wish me——

Q. They are identified in the bulletin? A. They are identified in the bulletin, yes, sir.

Mr. Mount: May the offer include the exhibits which are attached to the letter?

The Court: Yes, the circular letter and the exhibits are all received as one exhibit. Put a staple through them so they won't become separated.

Q. In response to the subpoena have you secured from your records copy of a letter of September 24, 1940, to members of the American Institute, Bulletin No. 1277? A. 710
I have that.

Q. This letter of September 24, 1940, to members, was signed by you? A. Yes, sir.

Q. And the enclosure with that letter has a number? A. It has a printed number, yes.

Q. What is that number? A. It is 87A68.

Q. What does that number signify? A. That is the number used by the printer for that particular form or clause.

Mr. Mount: I offer in evidence the letter and the enclosure. Part of the form which is enclosed is the very wording of the clause of the rider used in this 711
case?

Mr. Smith: The Government wishes to press an objection on the grounds of immateriality and irrelevancy, and especially to point out in this case that the clause is for use in connection with foreign hulls, and the hull involved in this suit was a U. S. flag hull.

Mr. Murphy: I join in that objection and I suggest to the Court that there ought to be no need of going around the barn in this way. If they have something that shows promulgation of this clause on American hulls, let us have it. I am sure they have.

712 *Ernest G. Driver, for Respondent Underwriters—Cross.*

There is no need of putting in clauses promulgated for cargo.

The Court: Just building up a little atmosphere.

The Mount: I just want to show this clause was a known clause in the market.

The Court: I am going to overrule the objections made with the same statement, I won't repeat it, that I made with respect to the other exhibits. I don't know whether I am going to consider any of them.

(Marked Respondent Underwriters' Exhibit 6.)

713 Mr. Mount: That is all.

Cross examination by Mr. Murphy:

Q. Mr. Driver, you are secretary of the American Institute of Marine Underwriters, am I correct in that? A. Correct, sir.

Q. I show you a policy of Lloyds London, marked in evidence here as Libelant's Exhibit 6. I will ask you to look at the form printed in black and white, headed "Calmar Steamship Corporation," which bears a clause printed in red ink on the left-hand margin, and which 714 is printed on both sides, and which on the back bears the notation at the very end, "American Institute," in capital letters, and then (hulls), in capitals, and then (July 1, 1941), and the letter F. Do you recognize that form? A. Not in that form I do not.

Q. I show you annexed to it a rider, printed on thin paper in blue ink, beginning with the words, "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free from claim arising from capture, seizure, arrest, restraint, detainment, requisition, nationalization, or condemnation," etc. At the foot it bears the letters B.C., and the figure 2 in Arabic. Do you recognize that? A. No, I don't.

(Witness excused.)

The Court: That was my interpretation as I read it. I don't see——

Mr. Murphy: For any damages by reason of the taking.

The Court: Of the taking, what I would call, as a layman, the condemnation of the ship.

The Witness: Well, now, that is——

Mr. Murphy: Pardon me, the condemnation——

The Witness: —is something else.

749 Q. The restraint or detainment? A. Restraint or detainment or capture, the physical taking of the boat.

Q. As a marine underwriter of your experience, will you state what was understood in the marine business by the last part of that clause beginning with "but unless"?

Mr. Murphy: Objection.

Mr. Smith: Objection.

The Court: Yes, you have your same objection. Same ruling.

A. During the war, to facilitate the movement of cargo, Great Britain and her Allies took vessels into control ports
750 in order to see whether they had contraband or other illegal cargo on them. The ship at that point, and the cargo, was in the control of the Government authorities, or it was captured. It left this—while going into those control ports, a very dangerous operation, because of lack of lights, mines, all sorts of things in the channels, the vessel was apt to be blown up or, because of the lack of lights, she was apt to go ashore, and be otherwise injured or destroyed.

The cases had been settled, that the underwriters were not liable. The underwriters didn't think that was doing their part of their job. So they constructed, first, the clause that is offered in evidence as the cargo clause, which is a little bit more specific because it was dealing with a single voyage, and then they constructed this clause to go on hull

policies, which might be either voyage policies or time policies, to show that they were willing, notwithstanding the fact that this vessel had been captured, nevertheless, if in entering a control port she was blown up by a mine, or if she went ashore by reason of faulty or other navigation, they would not refuse the claim because of that happening. It was to save the assured from something over which he had no control in a very limited situation, where the British Government had not captured it for the purpose of, at that point, condemning the boat because we say that if condemned, we were not liable, but for the purpose of finding 752
out whether the boat, perhaps, should be condemned, and the underwriters felt that under those circumstances it was their duty to go ahead with their assured and take care of this unusual situation. But it was always within the framework of that voyage, of that particular incident of the voyage. The words are general, I agree, in the hull policy. They are more specific in the cargo clause because they could be made a little bit more specific.

Mr. Smith: I ask that the answer——

The Court: That means that the cargo provision could be made more specific——

The Witness: Because it was—— 753

The Court: —but that the hull provision, you find, is sufficiently specific to carry out the purpose and the intent of the underwriters?

The Witness: Yes.

Mr. Smith: I ask that the answer be striken out as not responsive. We asked at the beginning that the question be directed to the meaning of the clause, not to the reason for its adoption, and the answer is a hundred per cent—an answer as to the reason why the underwriters adopted the clause and has nothing to do with the meaning of it.

The Court: I overrule your objections.

Mr. Murphy: I join in the objection.

The Court: The purpose of that cross examination, Mr. Murphy, would you state it for the record?

Mr. Murphy: Was to see if the secretary of the American Institute of Marine Underwriters recognized this print, which was extant and in the market, as being familiar to him and promulgated by his Syndicate. He said he doesn't recognize it.

WILLIAM D. WINTER, called as a witness on behalf of the respondent underwriters, being duly sworn, testified 716 as follows:

Direct examination by Mr. Mount:

Q. Mr. Winter, what is your present position? A. I am chairman of the board of the Atlantic Mutual Insurance Company and the Centennial Insurance Company.

Q. How long have you held that position? A. Since 1946.

Q. Is the Atlantic Mutual Insurance Company one of the small companies or one of the large companies? A. It is one of the leading companies in the marine insurance field. 717

Q. Has your company any financial interest in the outcome of this suit by Calmar against British underwriters? A. Not to the best of my knowledge and belief.

Q. Are you here today in response to a subpoena? A. I am, sir.

Q. Do Mendes & Mount represent your company? A. They do not.

Q. How long have you been engaged in the insurance business? A. 49½ years.

Q. Has that all been with the one company? A. Yes, sir, all with the Atlantic Mutual Insurance Company.

Q. Has that experience included underwriting risks? A. Yes, sir, since 1909.

Q. You have always been in the underwriting department? A. Yes, sir.

Q. When did you become an officer of the Atlantic Mutual Insurance Company? A. In April 1917.

Q. In your experience in underwriting have you insured both hulls and cargo or have you been limited to one class? A. Both hulls and cargo.

Q. Did you ever have any connection with the American Marine Insurance Syndicate? A. I did.

Q. What was that connection? A. For many years I was a manager of the Syndicate.

Q. Were you a manager in 1940? A. I was.

719 Q. Have you ever had any connection with the American Institute of Marine Underwriters? A. Yes, sir, I was director for many years and president of it for a while.

Q. Have you ever had any connection with the New York Board of Marine Underwriters? A. Yes, sir, I was a director of that and president for a period.

Q. Did you ever have any connection with the American Cargo War Risk Reinsurance Exchange? A. Yes, sir, I was chairman of that Exchange from its origin until May 1950—since 1939 to 1950.

Q. Will you please explain what that Exchange was? A. That Exchange was the American reinsurance market for war risk insurance on cargoes.

720 Q. Have you ever delivered courses and lectures on marine insurance? A. I have.

Q. Can you give us the details of that? A. Why I gave the first course in the United States at New York University in 1918; and following that I lectured at Columbia University and the College of the City of New York.

Q. Are you an author of books? A. I am.

Q. On marine insurance? A. I am.

Q. What book is your own on marine insurance? A. It is known as Marine Insurance by Winter.

The Court: Is it published now? I would like to see it.

The Witness: I would be very glad to send you a copy. You may have it.

The Court: No objection to my taking it and looking at it?

Mr. Murphy: Not the slightest, your Honor. It is a well known work.

Mr. Mount: Off the record.

(Discussion off the record.)

Q. That book is in its second edition, I believe? A. It is in its second edition and in the throes of its third edition. It is being reborn.

Q. Have you any idea how many copies have been sold? 722
A. Yes, in the 30 years in which it has been issued there have been upwards of twelve or thirteen thousand copies.

Q. In 1939 and 1940 were you active in hull insurance? A. I was.

Q. Did that include both marine and war risks? A. It did.

Q. Did you have any thing to do with rates, the fixing of rates? A. I did.

Q. In those years? A. Yes, sir, I did.

Q. Did you have anything to do with the passing on insurance clauses in those years? A. I was not a member of the committee that formulated the clauses but, as the 723
manager, I did pass on them for final approval.

Q. That is, manager f the Syndicate? A. Manager of the Syndicate.

Q. I show you a document which is entitled American Institute, October 1939, and in the upper righthand corner says 87A47. Can you identify that? A. This is the American Institute cargo free of British capture clause amended as of that date, as of October 1939.

Q. In your business as insurer did you keep in touch with the publications of the American Institute of Marine Underwriters? A. I did.

Q. Was the Atlantic Mutual Insurance Company a member of that Institute? A. They were and are.

724 *William D. Winter, for Respondent Underwriters—Direct.*

Q. I should have asked you, is this a free of capture clause? A. It is a free of British and Allied capture clause. It is not the f. c. & s. clause.

Q. And does it deal with cargo or hulls? A. This particular clause deals with cargo.

Mr. Mount: I offer this in evidence, with the same explanation, that it is referred to in the later discussion of the hull clauses.

The Court: I will take it, but, frankly, I don't see its relevancy, even by stretching my imagination. I
725 will take it.

Mr. Mount: I think your Honor will when you read the——

The Court: I will take it. I haven't read these minutes you introduced and, therefore, it may become material, but we will deem an objection made by the libelant and by the Government to its reception as being irrelevant and immaterial. I will overrule the objection and receive it in evidence at this time, with the same comment applicable to this exhibit as to the preceding exhibits.

(Marked Respondent Underwriters' Exhibit 7.)

726 Mr. Murphy: Will your Honor ask Mr. Driver to remain? I may want to recall Mr. Driver.

The Court: Yes, Mr. Driver will wait.

Q. In this document, which is a clause headed "American Institute Free of Capture Clause No. 3," and bears the number in the upper righthand corner 87A56— do you recognize that? A. This seems to be a different edition of the same clause. This is July 1940. I have forgotten what the date was on the one you showed me before. This also is a cargo clause.

Mr. Murphy: Cargo clause?

The Court: Yes, he says a later edition of the same cargo clause. I think the other was 1939.

The Witness: I think so.

Mr. Murphy: Same objection.

The Witness: And this is 1940.

The Court: Yes, we will deem the same objection made to this on the same grounds.

(Marked Respondent Underwriters' Exhibit 8.)

Q. Mr. Winter, were you present at a meeting of the managers of the Syndicate on July 18, 1940? A. July?

Q. On January 18, 1940. A. I was, at January 18, 1940. 728

Q. Yes, January 18, 1940. Have you a copy of those minutes? A. I have.

Q. Where did you get that copy? A. Out of my own company file.

Q. Do you know when you received those minutes? A. Why, it would have been within a day or two days following the holding of the meeting, just as quickly as the minutes could be produced.

The Court: Are these the minutes of which we have had extracts marked in evidence?

Mr. Mount: Yes, they are, and I was just going 729
to ask him if they are the same.

The Court: Show him the exhibit. What is it?

Q. I show you Underwriters' Exhibit No. 4. A. Well, it is in a little bit different typewriting. This is an extract, and I have the complete minutes.

Q. Is the extract, as far as it goes, in agreement with the copy that you have from your own records? A. Not taking the time of the Court to read it word by word, it is, if that is agreeable.

Q. And you were present at that meeting? A. I was.

Q. In those minutes appears the statement that the Policy Committee further reported a certain thing with

730 *William D. Winter, for Respondent Underwriters—Direct.*

respect to the British free of capture clause. A. Free of British capture.

Q. Free of British capture clause. Can you state whether there was that report submitted to the meeting and whether there was the action taken as is stated in the minutes of the meeting?

Mr. Murphy: Will you wait just a second, Mr. Winter?

Will you show me what you are pointing to?

Mr. Mount: Yes.

731 The Court: Why don't you ask him the simple question, does this exhibit fairly and accurately record the transactions had at that meeting.

Mr. Mount: And the discussions.

The Court: And the discussions.

Q. I will ask you that question. A. It does.

Q. From your experience and your knowledge of insurance, will you state what is understood in the insurance world by the first part of the clause which is quoted in those minutes down to the words "but unless"?

Mr. Murphy: If the Court please, I object to that
732 question on the ground that Mr. Winter has testified that he had nothing to do with the preparation of that clause or the drafting of it; that he was simply a manager of the Syndicate and had to pass on it and, therefore, he is not in a position to testify as to any intention that existed in the minds of the draftsmen.

Second, he is now being asked to testify to what the marine insurance world now understands——

Mr. Mount: Exactly.

Mr. Murphy:—as I understand it, and that, I submit, is irrelevant and immaterial.

The Court: It may become important to know how the marine insurance world interpreted this

clause both at the time it was adopted, first put into use, and after it was used, while it was being used at or about the time of the date of the policy in question in suit. That you may ask him. I deem an objection made to it, as to its materiality and its relevancy, and I will overrule the objection with the same observation that I have made as to the receipt of all these other exhibits——

Mr. Mount: I understand.

The Court: —which have been received in evidence. I don't think any of this testimony would 734
at all become important unless it became necessary to inquire into the intent of the parties.

Mr. Mount: The purpose——

The Court: The intent of the parties, as I see it, though, is best proved, not by what others thought, or how others acted with reference to a particular clause, but as to how they themselves acted and as to how they themselves thought concerning this clause. You cannot show the parties' intent by showing the intent of someone else on another transaction.

Mr. Mount: No, but, your Honor, the cases have held that marine insurance is a very technical subject
and that, in the event of any ambiguity or uncer- 735
tainty as to the meaning of the clauses, expert evidence from those who are familiar with the marine insurance——

The Court: I will take it, but I seriously question whether I am at all going to consider it. But before we take it, we might ask this expert witness, and I guess his expert qualifications are conceded.

Mr. Smith: Yes.

Mr. Murhpy: No doubt about it.

The Court: We will ask him a question as to whether or not he, on reading this clause, found it indefinite, uncertain or ambiguous.

Mr. Murphy: I would object to that question, your Honor.

The Court: Your objection is noted.

Mr. Murphy: Yes, your Honor.

The Court: It is overruled.

Do you find this clause, which you voted to adopt, I understand you voted to adopt, do you find it indefinite, uncertain or ambiguous?

The Witness: I do not.

The Court: Do you withdraw your objection, Mr. Murphy?

737 Mr. Murphy: I withdraw my objection in view of the witness's answer.

The Court: All right.

Have you ever found it indefinite, uncertain or ambiguous?

The Witness: No, because I know why it was written.

Mr. Mount: Well now, with the dispute raised by the other side, I would like to ask this witness what the understanding of the insurance market is.

738 Mr. Smith: Mr. Mount, do you contend that words of art are being used in this clause that are different from their customary and ordinary usage in the English language?

Mr. Mount: I say it is a combination of words which is not perfectly clear to those who are not engaged in the marine insurance business.

The Court: Not because of any words of art?

Mr. Mount: Not because of any words of art.

The Court: You claim, because of the phraseology——

Mr. Mount: Because of the phraseology——

The Court: —that one unfamiliar with the field would not know what it was all about?

Mr. Mount: Yes, sir.

Mr. Smith: All the words are used in their ordinary and customary sense, only the combination is art, is that the contention, Mr. Mount?

The Court: I would like to get your contention on this. Wherein do you assert—I would like to get it on the record—wherein do you assert that this clause is indefinite, uncertain or ambiguous?

Mr. Mount: I say that the words—the first half of the clause excludes capture, restraint, detainment, and so forth, and then there is a "but" followed immediately by, "unless the insured vessel is condemned, this warranty," that is, this exclusion, "shall not exclude losses otherwise covered by this policy," and I am endeavoring to show by an expert what is the meaning of those words, "losses otherwise covered by this policy". 740

The Court: Well, we will hear from Mr. Murphy who has been getting high blood pressure while you were talking.

Mr. Murphy: All I wanted to get in, your Honor, was that the last couple of questions of this expert witness have closed the door to all that sort of thing.

The Court: I am going to allow this question so that, after we have completed the trial, in case I should arrive at the point where this testimony would be helpful, I will have it in the record. 741

Mr. Smith: If your Honor please, just one——

The Court: I will indicate in my decision what consideration, if any, I gave to this testimony.

Mr. Smith: I think the witness should be directed to confine his answer to the meaning of the words in ordinary, common insurance parlance and not to the reason they were adopted. I think the reason that they are adopted is entirely immaterial.

Mr. Mount: I am perfectly willing to have that restriction.

742 *William D. Winter, for Respondent Underwriters—Direct.*

The Court: Are you an attorney, a member of the Bar?

The Witness: I have to admit I am. I have earned two dollars as a lawyer in my life. So you know how good I am.

The Court: I think your legal training must have come in very useful to you in your work, and you should not hesitate to admit you are a member of the Bar in good standing.

The Witness: I don't hesitate——

743 The Court: A subject of which you should be very proud.

The Witness: —to admit it, but I just didn't want you to draw an improper conclusion as to my experience. I earned two dollars within a week of my admission to the Bar and from that time on I have been an insurance man.

The Court: Let us get the answer to this question.

Now, you know what the question is? Objection is being made as to its relevancy and materiality and it is overruled.

744 The Witness: I don't know, your Honor, whether I can—I am not trying to take back the answer, but I was asked if I understood—if I thought this was unambiguous and, as a marine underwriter of long experience, I say it isn't to me, to a marine underwriter. Now, as a textbook writer, if I may, there are many clauses in the marine insurance business that to the layman are utterly ambiguous.

Now, with that, what question do you want me to answer?

By Mr. Mount:

The question was, will you state what the meaning in the insurance world was in 1940 and since then of the first part of the clause down to the words "but unless".

Mr. Murphy: I object again, your Honor, on the grounds——

The Court: Note your objection——

Mr. Smith: Same objection.

The Court: —Mr. Smith. The objection is overruled with the same comment that I have made continuously.

A. I want to make sure before I answer what—you say from the beginning——

The Court: Talking about the beginning of 746 the——

A. —words, "notwithstanding"——

Q. From the beginning down to the words "but unless".

Mr. Murphy: May I ask, are we dealing with the hull clause?

Mr. Mount: We are dealing with the hull clause.

A. Well, down to that point this clause frees the underwriters of any responsibility for capture, seizure, arrest, restraint, detainment, requisition, nationalization or condemnation by or under the authority of the Government of 747 Great Britain, France or its Allies.

The Court: If the Government of Great Britain or any of its Allies seize the ship——

The Witness: We are not liable.

The Court: —for governmental use you are not liable for the seizure?

The Witness: That is right.

The Court: But the insured has to look to the British Government, let us say, or the one who seized it for compensation, if they get any?

The Witness: I don't know who they are going to look to.

754 *William D. Winter, for Respondent Underwriters—Direct.*

The Court: The purpose of its adoption may bear upon what the parties intended to apply in construing it.

Q. I show you Libelant's Exhibit 6, which is one of the three similar policies which are in suit here. Will you note the voyage which is described in that policy? A. I have.

Q. Will you also note the held covered clause.

Mr. Murphy: It is at the foot of the war risk rider.

755

A. Yes, I have noted it.

Q. Will you please assume that the SS. *Portmar* was a registered U. S. single-screw, ocean-going steamship of approximately 8,600 tons deadweight——

Mr. Murphy: Just a minute. I don't like to interrupt, Mr. Mount, but we are heading into a hypothetical question on which he is going to ask this witness to decide a question which is for the Court alone, and we are wasting time.

The Court: He may ask this witness about the rates, the same as he asked the London underwriters.

756 I don't know what the purpose is.

Mr. Mount: I shall eventually. This one I wanted to ask was, under the facts which are alleged in the libel and stated by the master in his testimony, when the voyage which is described in the policy came to an end, according to the understanding of the insurance world.

The Court: He cannot testify as an expert on that matter. I in my——

Mr. Mount: You are the one.

The Court: I, in my humble field, with my very inadequate training and knowledge, am the expert on that.

Mr. Mount: You, of course, are the one to finally decide it.

The Court: So if you offer to prove that by this witness, I must sustain the objection.

Mr. Mount: May I state on the record that I would like to ask the witness——

The Court: Suppose we put the answer on the record, so that in case somebody is looking for it—but I don't see it. No, I am not going to allow it. No. Objection sustained and your offer of proof in that respect is rejected. 758

Mr. Mount: Will your Honor allow me an exception?

The Court: Yes, the law gives you an exception.

Mr. Mount: Now I want to ask the witness a question about the additional premium.

The Court: Yes, similar to the hypothetical question you put to the London underwriters?

Mr. Mount: Exactly.

By Mr. Mount:

Q. Will you please assume that the SS. *Portmar* was a registered U. S., single-screw, ocean cargo steamship of approximately 8600 tons deadweight, built in 1919, classed 100-A-1 with Lloyds Register of Shipping, and owned by Calmar Steamship Corporation; 759

Will you also assume that the SS. *Portmar* sailed from San Francisco on or about November 28, 1941, with cargo, bound for Manila in the Philippine Islands;

That the Japanese Government declared war on the United States on December 7, 1941, and thereupon invaded the Philippine Islands;

That on December 11, 1941, the SS. *Portmar* ceased following the voyage to Manila and proceeded to the Fiji Islands, thence to Sydney, Australia, arriving there on December 30, 1941, thence to Brisbane, where she discharged

760 *William D. Winter, for Respondent Underwriters—Direct.*

part of her cargo, and thence to Port Darwin, Australia, where she arrived January 19, 1941, and discharged the balance of her cargo, excepting about 2000 drums of gasoline——

The Court: That is January 1942, isn't it?
Mr. Mount: January 19, 1942, right. Thank you.

Q. (Continuing)—about 2000 drums of gasoline and then she proceeded to Wyndham, Australia, where she discharged the balance of her cargo;

761 Assume also that while she was at Port Darwin the assured's brokers, Mather, sent a cable to the London brokers, Stephens, in the form which I show you and which has been stipulated in evidence;

Will you also assume that Stephens, the London brokers, wrote to Mather in the form that I show you, a letter dated February 6, 1942;

Will you also assume that after all the outbound cargo of the SS. *Portmar* had been discharged at Wyndham, Australia, on or about February 10, 1942, the vessel returned to Port Darwin without any cargo, arriving there on or about February 12, 1942, and that she went to berth there

762 on or about February 13, 1942;

Will you also assume that the SS. *Portmar* was there loaded on February 13 and 14, 1942, with military equipment, stores, ammunition, field guns, and between 300 and 400 officers and men of the United States Field Artillery, and was ordered to proceed to Koepang at the western end of the Island of Timor on February 14 or 15, 1942, and sailed from Port Darwin for Koepang on February 15, 1942, and that the Port of Koepang had already been bombed by Japanese war planes;

Will you also assume that it is held by this Court that the policy of insurance, Plaintiff's Exhibit 6, covered the SS. *Portmar* beyond the time she sailed from Port Darwin to Koepang on February 15, 1942, and that such sailing was merely a deviation or change of voyage;

Can you state whether, assuming such holdings of the Court, additional premium would be due under the policy? Will you answer yes or no? A. Yes.

Q. What is the answer to that question? A. You mean payment of premium?

Q. Would additional premium be due? A. Would additional premium——

Mr. Murphy: Objection on the ground that——

The Court: I don't think it is within this witness's province. Objection sustained.

But assuming that an additional premium was 764
due, what in your opinion would be the fair amount of such additional premium?

I will deem an objection made as to its relevancy and materiality by both sides, and the objection is overruled, with the same comments that I have made with reference to the depositions of the London underwriters.

Mr. Smith: Except I ask to add an additional ground of objection, that the hypothetical question does not include many material factors bearing upon the case.

The Court: It doesn't, but let us not get too 765
technical. It would take two days to frame the question.

Mr. Mount: I will add anything you think should be added within the facts.

The Court: It would aggravate rather than minimize the situation, so you had better leave it the way it is.

What in your opinion, assuming that additional premium was due under such circumstances, what would be the fair and reasonable rate to have charged in the marine insurance field at that time?

The Witness: You want me to name a rate?

The Court: Yes.

766 *William D. Winter, for Respondent Underwriters—Direct.*

The Witness: In my considered opinion it would have to be at least 100 per cent.

The Court: That means you would not take the risk?

The Witness: Well, on the hypothetical question, I couldn't avoid it. It has been assumed that you ruled that I was on the risk, so I have got to name a rate under the held covered clause under your ruling. Now, it is uninsurable, to my mind. And the reason I say not less than a hundred per cent is that we might also not only have a total loss but have
767 sue and labor charges and maybe general average, and salvage charges which might run up the loss too much over the value of the insured thing.

The Court: In other words, if you could decline the risk under those circumstances you would decline to take it?

The Witness: Certainly would.

Q. And this answer that you have given is that what your judgment would have been in 1942, if you had known of the facts which I asked you to assume?

768 Mr. Murphy: I object to that on the ground that what would have been——

The Court: I thought I put it in my question.

Mr. Mount: I think you did, but I just wanted to be sure.

The Court: Objection overruled. It is the same.

The Witness: Now, will you state that question again?

Mr. Mount: Will you read the question?

(Question read.)

A. It would be.

Mr. Mount: That is all.

Cross examination by Mr. Smith:

Q. Do you know of any case in which a hundred per cent excess premium was charged? A. I cannot cite it to you, but there have been cases where—an uninsurable risk—in order to comply with the held covered clause, that amount has been charged.

Q. Under circumstances similar to those posed in the hypothetical question, to your knowledge, was any hundred per cent premium ever charged? A. I cannot quote you a case, no.

Q. The answer is you don't know of any? A. The 770
answer is I don't know of a case.

Mr. Murphy: No questions.

(Witness excused.)

The Court: Any further witnesses?

Mr. Mount: We have no further witnesses. I think we are ready to rest subject to the question of our asking Mr. Murphy to produce the judgment of the salvage suit in Australia that was sent to Calmar. I think it should be produced for whatever weight it may have.

Mr. Murphy: Pursuant to the call of counsel, I 771
produce from our file a copy of what purports to be the judgment of the High Court of Australia in admiralty jurisdiction, rendered November 19, 1943, in the case of United Salvage Proprietary, Ltd. and Williams against the ship *Portmar* and also the case of Salvage Board against Calmar Steamship Corporation, judgment being by Judge Starke.

Mr. Mount: Inasmuch as the underwriters here have been sued with respect to this salvage suit in Australia, which was defended by Calmar without prejudice to themselves or underwriters we offer in evidence this judgment which was furnished by Calmar's attorneys in Melbourne to Calmar, which is

part of the record of the suit, the judgment for which we are sought to be held.

The Court: I don't see how it is material in view of the concessions that have been made. You conceded that they paid 20-odd thousand dollars——

Mr. Mount: Yes.

The Court: —as a result of the salvage award to this man Williams.

Mr. Mount: Yes.

The Court: You have conceded that they ex-
773 pended a certain amount of monies in the defense of this suit and paid some solicitors in Australia. That amount has been proved. I don't remember how much that was. So how is this material?

Mr. Mount: There is one point in this judgment which I think is material. It shows that these two salvage claims, which have been made so much of by Calmar's attorneys, were parallel claims, one made by Williams, as his private company, and one made by the Government Salvage Department, of which Williams was just about that time made the head, and the Court found that Williams was doing his
774 work in his private capacity and not as the Government.

The Court: There doesn't seem to be any issue on that, Mr. Murphy says.

Mr. Mount: Will you concede that?

The Court: Wait a minute. Let us see if he doesn't.

Mr. Mount: He claims——

The Court: Mr. Murphy says, "There was a lot of expense incurred in salvaging this vessel, there were monies expended by Williams as an individual, there were monies expended by the Commonwealth. We only had to pay Williams, but Williams did not do all the work, and we were lucky to escape payment of the other bills submitted by the Commonwealth."

Mr. Mount: Oh, no, no. No, your Honor, this is a claim of pure salvage for raising the vessel, and, you see, that claim for raising the vessel was made by Williams as his private company and was made by the Australian Government of whose Department of Salvage Williams was appointed head just about that time, and the Court in this judgment pointed out—this is merely for raising the vessel—the Court pointed out——

The Court: I understand that, but maybe I don't get your point. 776

Mr. Mount: I get the point that there was a claim of 150,000 pounds——

Mr. Murphy: I dispute that.

Mr. Mount: —for salvage. It should go in.

Mr. Murphy: Two independent claims were asserted, for 100,000 pounds by the Government and 50,000 pounds by the United Salvage Proprietary and Williams, and they were both litigated together. They were separate and independent salvage claims.

Mr. Mount: Well, it was for the same service, and the Court said——

Mr. Murphy: You are arguing now. 777

Mr. Mount: —any award we give must go to Williams' private company because the Government was not at that time functioning, that is, the Salvage Department.

Mr. Murphy: Mr. Mount is testifying.

Mr. Mount: No, I am pointing out why I want to put this in. I simply want to meet the claim that there were claims for 150,000 Australian pounds.

Mr. Murphy: Yes, salvage claims.

Mr. Mount: For salvage.

The Court: You don't dispute claims were made against the ship for that amount?

Mr. Mount: But they were for the same work.

778 *William D. Winter, for Respondent Underwriters—Cross.*

Mr. Murphy: Well, the claims were made and litigated.

The Court: And you say this decision holds that it is for the same work?

Mr. Mount: Yes, and it says that it is dismissed as to the Government Salvage Department.

The Court: Are there findings of fact?

Mr. Murphy: There are, your Honor.

The Court: Reported findings of fact?

779 Mr. Murphy: Yes, there are many findings in that judgment.

The Court: Which are made an integral part of the judgment?

Mr. Murphy: Yes.

Mr. Mount: Yes.

The Court: On what theory do you say it is admissible in this suit?

Mr. Mount: Because Calmar was defending that suit for account of themselves and underwriters without prejudice, whichever should finally be held liable to pay the salvage award.

780 Mr. Murphy: That doesn't make it admissible.

The Court: In other words, you claim that although nominally the underwriters were not parties to this suit, actually there was a relationship between Calmar and the underwriters created by agreement?

Mr. Mount: Right.

The Court: Did it mention them as a party?

Mr. Mount: It had been agreed that Calmar should defend it without prejudice to who should be ultimately interested in paying the salvage award.

The Court: I will receive it in evidence. I overrule the objection of Mr. Murphy. I don't know what weight I will give it.

Mr. Murphy: I understand your Honor has overruled my objection——

The Court: Yes.

Mr. Murphy: —in objecting to the admissibility?

The Court: Yes.

Mr. Mount: That goes in as Underwriters' 9.

(Marked Respondent Underwriters' Exhibit 9.)

Mr. Mount: We rest.

The Court: I may determine to disregard this 782
entirely.

Mr. Mount: I understand.

The Court: If I do, I will indicate it in my opinion.

Mr. Murphy: I will ask Mr. Mount and Mr. Smith to stipulate that these three policies, Libelant's Exhibits 6, 7 and 8, were written on the American Institute of Marine Underwriters' basic form with riders attached to it current in the market and promulgated by the American Institute of Marine Underwriters through the American Syndicate.

Mr. Smith: I really don't know. 783

Mr. Murphy: And that the policies were issued on those terms.

Mr. Smith: I don't know the answer to that, your Honor. I will stipulate that the policy form was submitted to the Government and accepted by it as being in accordance with the obligation to take out a policy in that form, but I don't know whether it is in that form or not.

Mr. Mount: We will agree, just subject to checking.

The Court: All right.

784 *Clarence H. Grotefend, for Libelant—Direct.*

CLARENCE H. GROTEFEND, called as a witness on behalf of the libelant, in rebuttal, being duly sworn, testified as follows:

Direct examination by Mr. Murphy:

Q. Mr. Grotefend, where do you live? A. Elkins Park, Pennsylvania.

Q. What is your occupation? A. I have been with Mather & Company, insurance brokers, Philadelphia, 40 years.

785 Q. Were you concerned in the placement of war risk hull insurance on the SS. *Portmar* in late October and November 1941? A. Yes, sir.

Q. Through whom in London did you approach the underwriters for the placement of this insurance? A. Our London correspondent, Thomas Stephens & Sons, Ltd.

Q. Did you in your application for this insurance make any statement to Thomas Stephens & Sons, Ltd. as to the fact that the vessel was going to be used for trading on the insured voyage? A. No, sir, I made no statements as to what she would do.

Q. Did you inform Thomas Stephens & Sons, Ltd., that 786 the vessel was under charter to the Maritime Commission? A. Yes.

Q. I show you Libelant's Exhibits 6, 7 and 8. Do you recognize those policies? A. Yes, sir.

Q. Are those the policies which were sent to you by Thomas Stephens & Sons, Ltd.? A. They are.

Q. I will ask you to assume that all these policies are in the same form, and I show you Libelant's Exhibit 6, and ask you to look at the paper that is pasted on the outside folder, which is headed Calmar Steamship Corporation, which bears on the left a clause, printed in red ink, in the margin, and which on the back comes down to the words, "Attached to policy No. D41/11356 of Lloyds London."

Then the words, American Institute Time, the word "Time" being in capitals, and then parenthesis, the word "Hull" in capitals, close parenthesis, then the date in parenthesis, July 1, 1941, close parenthesis, and then the capital letter F. Did you send that paper to Thomas Stephens & Sons, Ltd.? A. Yes, sir.

Q. Where did you get it? A. Well, this particular paper——

Q. Yes. A. (Continuing)—was printed in our office printing department. This is a word-for-word copy of the American form, that it says there; also substantially a copy 788
of the syndicate policy in use at the time.

Q. You say "substantially." What do you mean by "substantially a copy of the syndicate policy"? A. Well, they would have other matter on there, such as names of subscribing companies, and so forth, but the conditions——

Q. But the insurance clauses and conditions are the same?

The Court: Answer; don't shake your head. A. Yes.

The Court: Are the insurance clauses and conditions the same?

The Witness: Yes.. 789

The Court: The only thing you omitted was the name of the company, the underwriter.

The Witness: That is right. We used then to fill in the name of the steamship company.

Q. Pasted to that American Time Hull form rider which you have just discussed, there are three pieces of paper of lightweight stock in blue typing. Did you send those three pieces of paper to Thomas Stephens & Sons, Ltd., to be included in the policy? A. Yes, sir.

Q. Where did you get those? A. Those also were printed in our office printing office but copied from the clauses which had been used on numerous occasions before.

Q. First of all, what was the source of those clauses? Where did your printing office get the clauses that are set forth on those three pieces of tissue? A. From the syndicate.

Q. Are those syndicate clauses? A. Yes, sir.

Q. Were those clauses outstanding and in use at the time you sent them to London? A. We received syndicate policies with such clauses on them.

Q. But I am first asking you, were those clauses set forth on those blue typed tissues that are pasted onto that
791 basic marine policy, were those regularly used clauses published in the American market by the syndicate at the time? A. Published——

The Court: Were those clauses currently being used in marine policies written by the syndicate at the time?

The Witness: Yes, sir.

Q. Did you or your office have anything to do with the draftsmanship of the language used in those clauses of the policy? A. No, sir.

Q. Are we to understand that in the case of the three
792 policies mentioned, Libelant's Exhibits 6, 7 and 8, you sent physically all the attachments, that is, the marine hull rider and the American Time Hull form and the tissue riders pasted onto it to Thomas Stephens & Sons, Ltd.? A. Yes, sir.

Q. For attachment to the policy? A. Yes, sir.

Q. And when the policies were returned to you, signed by Lloyds, the three papers you sent to Thomas Stephens were pasted onto the Lloyds' and the underwriters' and the Excess Insurance Company, Ltd.'s backing, base form? A. Yes.

Q. Is that right? A. That is correct.

Q. Did you use these same forms, American Time Hull forms and these blue typed tissues attached to them in any

other risk that you placed through Stephens with Lloyds' Underwriters and the English companies? A. Yes, for over a period of five years.

Q. Over a period of— A. 1940 to 1945.

Q. From 1940 to 1945? A. Yes.

Q. Some other risks were placed then before this *Portmar* risk was placed— A. Yes.

Q. —on the same forms? A. Yes.

Q. Have you anything in the file which shows a quotation of war risk insurance rates from American ports to Australian ports effective around the date of February 15, 794
1942? A. Yes, sir.

Q. Will you produce it, please?

Mr. Mount: Rates war risk or marine?

Q. (Continuing) War risk insurance rates, Mr. Grotefend. What is this paper, Mr. Grotefend? A. That is a circular issued by the American Marine Insurance Syndicate, publishing war risk rates at which they would accept war risk for the various trips that are shown thereon.

Q. Did your firm receive this paper in the regular course of business? A. Yes, sir.

795 Mr. Murphy: I offer it in evidence.

The Court: You offer this in evidence and you draw particular attention to——

Mr. Murphy: Two lines.

Mr. Mount: 28?

Mr. Murphy: Lines 27 and 28.

(Marked Libelant's Exhibit 54.)

The Court: By this you urge that the additional premium chargeable, if any, would be not more than 4½ per cent?

Mr. Murphy: 6½ per cent, your Honor.

If the Court please, I offer this in rebuttal to Mr. Mount's point about the additional premium, and

796 *Clarence H. Grotefend, for Libelant—Cross.*

subject to all my objections as to his contention about additional premium.

The Court: All right.

Mr. Murphy: Your witness.

Mr. Smith: The Government objects as to materiality only.

The Court: Objection overruled at this time.

Cross examination by Mr. Mount:

Q. You have no quotation of rates from Port Darwin to
797 Koepang on the Island of Timor? A. You mean on this sheet?

Q. On this sheet or from any other source. In other words, these were all rates from the United States? A. Well, I didn't make the rates, sir. There they are.

The Court: That is all you have?

The Witness: That is all I have, yes, sir.

Q. You have no rate from Australia to Timor Island or Koepang in the Island of Timor? A. This is all I have (indicating).

798 Mr. Smith: That is all.

(Witness excused.)

The Court: Do you rest, Mr. Murphy?

Mr. Murphy: Yes, your Honor.

The Court: Both sides rest?

Mr. Smith: I rest.

Mr. Mount: I do.

The Court: Your first briefs will be submitted February 15 together with proposed findings and conclusions of law, and at that time the exhibits, with the schedules that I mentioned during the trial will be submitted, and reply briefs, if any, will be submitted on March 1st.

799

Testimony Taken by Depositions.

Captain Axel Michelson—Libelant's Exhibit 26.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
Libellant,
against
UNITED STATES OF AMERICA, *et al.*, and EMORY S. LAND, Administrator, War Shipping Administration,
Respondents.

Ad. 129-295.

800

CALMAR STEAMSHIP CORPORATION,
Libellant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's underwriters, and EDINBURGH ASSURANCE Co., Ltd., *et al.*,
Respondents.

Ad. 133-332.

801

Depositions on behalf of the libellant, taken pursuant to notice of taking deposition served on counsel for the respondents in Admiralty 133-332 on July 17, 1945, and similar notice served on counsel for the respondents in Admiralty No. 129-295 on the same date, at the office of Messrs. Kirlin, Campbell, Hickox & Keating, 120 Broadway, New York City, July 31, 1945.

Appearances:

Messrs. KIRLIN, CAMPBELL, HICKOX & KEATING (Mr. E. S. MURPHY and Mr. IRA CAMPBELL) for the libellant.

JOHN F. X. MCGOHEY, Esq., United States Attorney (Mr. WILLIAM E. COLLINS, Special Assistant) for the respondents in Admiralty 129-295.

Messrs. DUNCAN & MOUNT (Mr. RUSSELL T. MOUNT and Mr. HALL), for the respondents in Admiralty 133-
803 332.

Mr. C. L. GROOM also present.

OATH OF REPORTER.

I, FRANCES DECARO, the person before whom the depositions of Axel Michelson and Joseph E. Bullock in the above-entitled cause are scheduled to be taken, swear that, in so doing, I will comply fully with the provisions of Admiralty Rule XLIV of the United States District Court.

FRANCES DECARO.

804

Sworn to before me this
31st day of July, 1945.

HARRIET C. THIRKIELD,
(Notary Public stamp)

(SEAL)

It is stipulated that the testimony may be taken by a stenographer, signing being waived, stenographer's fees to be taxable.

It is further stipulated that any testimony taken from any witness either under direct or cross-examination by

any party may be offered by any party in either case above entitled.

Mr. Murphy: I wish to make a correction in libel in Admiralty 129-295. A typographical error appears in Article Twenty-third, the first line, where the word "respondent" should be "libellant". I ask the consent of counsel that this correction be made on the record.

Mr. Collins: No objection.

Mr. Murphy: The libel in Admiralty No. 129-295 was filed February 11, 1944. While the respondents have 806 appeared, no answer has yet been filed. I call upon counsel for the United States of America et al. to state upon the record the nature of the answer of the respondents to the libel in this suit.

Mr. Collins: On the basis of existing information, and reserving the right to supplement or change the outline of defenses as the evidence develops, the respondents will first move to dismiss unless the suit is discontinued against the individual respondents. The respondents will further contend that the Court has no jurisdiction of the subject matter of the action for the reason that at the times involved the steamship *Portmar* was a public vessel of the 807 United States.

As to the first cause of action which seeks charter hire from March 1, 1942 up to the date of the requisitioning of title to the *Portmar*, the respondents will contend that there is no liability for the reasons that as of March 1, 1942 the subject matter of the charter, namely the Portmar, had ceased to exist for the purposes of charter; further that the vessel was prevented by action of the military and naval authorities, British, Australian, and to a certain extent American, from performing her charter obligations.

As to the second cause of action the respondents will contend that there is no liability under a proper construction of the articles of the charter on which the libellant relies.

808 *Testimony Taken By Depositions.*

As to the third cause of action respondents deny any liability on the ground that there are no circumstances which under the terms of the charter make the respondents or any of them liable for the losses claimed.

Mr. Murphy: Is it stipulated that the United States requisitioned title to and possession of the *Portmar* on November 12, 1942 effective at Brisbane, Australia at noon November 17, 1942, Eastern Australian Time?

Mr. Collins: That is correct, subject to check.

Mr. Murphy: Mr. Mount, will you state the nature of
809 the answer of your clients in Admiralty No. 133-332?

Mr. Mount: In Admiralty No. 133-332 on behalf of the respondents I can state that the following is our anticipated defense:

1. The round trip voyage of the SS. *Portmar* from a United States Pacific port to port or ports in the Philippine Islands, whilst there and return to a United States port, covered by the respondents' policies, was abandoned and terminated at the very latest on discharge at Wyndham, Australia, February 9, 1942, of the last of the vessel's cargo which had been loaded on her in the United States.

2. The exclusive management, possession and control of
810 the SS. *Portmar* was taken over by the United States Army at least as early as February 10, 1942, at Wyndham, Australia, when the vessel, having there discharged the last of the cargo loaded on her in the United States, was converted from a commercial vessel engaged in trade to an Army transport, employed as a troop, munitions and supply transport, for the combat forces of the United States, and ordered by the United States Army to proceed with such troops, munitions and supplies from Port Darwin to Koepang, Timor, and into an active combat area. The nature of such military employment of the vessel and the nature of the risk to which she was subjected thereby were not within the coverage of the policies issued by the respondents.

3. The respondents are not liable under their policies for any damage sustained by the SS. *Portmar* as alleged in the libel, because such damage was occasioned by and arose from the willful and intentional exposure of the vessel to enemy action.

4. As a separate and partial defense by way of set off:

If the Court should hold the libellant entitled to any recovery against the respondents, such recovery should be reduced by the amount of additional premium provided for in the respondents' policies and to be determined by the Court. 812

5. As a separate defense to the libellant's first cause of action:

Under the provision of the respondents' policies reading—

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovery and repairing the vessel shall exceed the insured value."

there was not a Constructive Total Loss of the SS. *Portmar* under the respondents' policies, and the libellant's attempted abandonment on April 8, 1942, was invalid. 813

6. As a separate defense to the libellant's first cause of action, and irrespective of the preceding defense (No. 5), the actual situation with respect to the SS. *Portmar* on April 8, 1942, did not justify the attempted abandonment of the vessel to Underwriters under the High Probability Rule.

This statement of our defenses will of course not preclude us from additional defenses depending on developments coming out in the testimony, and further we are unable to state at the present time what our answers will be to the specific paragraphs of the libel which allege communications between the libellant's London brokers

814 *Deposition of Axel Michelson—Direct.*

and the respondents. We have written to London requesting copies of any communications which passed between libellant's London brokers and the respondents and when we get those we will let you know, Mr. Murphy, what our answer will be on those paragraphs.

Mr. Murphy: As to the reservations made by Mr. Mount and also by Mr. Collins, I wish to state that I shall take such objections as may be proper to any extensions of the answers which have been indicated this morning.

815

AXEL MICHELSON, being duly sworn and examined as a witness on behalf of the libellant, in accordance with the requirements of Rule XLIV of the United States District Court, testified as follows:

By Mr. Murphy:

Q. Where do you reside, Captain? A. Oakland, California.

Q. What is the street address? A. 4424 View Street.

Q. Are you an American citizen? A. Yes, sir.

816 Q. Since what date? A. I believe the 23rd of August 1916.

Q. Where were you born? A. Denmark.

Q. Are you a master mariner? A. Yes, sir.

Q. What license do you hold? A. Unlimited sail and steam, unlimited steam and motorships in the United States of America.

Q. How long have you held your Danish license as ship master? A. Unlimited Danish license since July 1909.

Q. And how long have you held your American ship master's license? A. Since 1920.

Q. How long have you been going to sea? A. Half a hundred years.

Q. In what kind of ships did you start your service at sea? A. Sailing ships.

Q. Did you ever serve in the engineroom at sea? A. No, sir.

Q. Always on deck? A. Yes, sir, always.

Q. How long have you been in the employ of Calmar Steamship Corporation? A. Since October 1927—I am not quite certain about that October.

Q. In what capacity did you enter the employ of Calmar Steamship Corporation? A. I was chief mate on one of the ships when Calmar took it over.

Q. Do your remember the name of that ship? A. *Massmar.*

818

Q. When did you first take command of a Calmar Steamship Corporation vessel? A. I made only one trip as chief mate—when I returned to the Atlantic Coast I was made master of the ship.

Q. Was that in 1927 or '28.? A. I believe that was into 1928.

Q. Have you served as master of various Calmar Steamship Corporation vessels since that time? A. Yes, sir.

Q. Have you been continuously in the employ of Calmar Steamship Corporation since that time? A. Yes, sir.

Q. On November 23, 1941 what was your position? A. I was master of the *Portmar.*

819

Q. Where was the *Portmar* on that date? A. She was in San Francisco Harbor.

Q. How long had you been master of the *Portmar* prior to that date? A. I am not quite certain—I believe about fourteen months—that may be a month either way.

Q. What kind of a ship was the *Portmar*? A. The *Portmar* was an ocean-going steamship.

Q. What was her deadweight capacity? A. 8600 tons.

Q. At what draft? A. At her summer draft, 24 feet.

Q. Was she twin screw or single screw? A. She was single screw.

Q. What kind of engines did she have? A. Triple expansion.

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Mr. Murphy: Is it stipulated that the particulars of the *Portmar* as alleged in Article Second in the libel, which are taken from Lloyd's, are correct, subject to check?

Mr. Mount: I am willing to stipulate it.

Mr. Collins: Yes, I will so stipulate.

Q. Who was your employer as master of that vessel? A. Calmar Steamship Corporation.

Q. Who paid your wages? A. Calmar Steamship Cor-
821 poration.

Q. Who paid the wages of the other officers and crew? A. Calmar Steamship Corporation.

Q. Who provisioned and supplied the vessel with all food and stores and equipment? A. The same.

Q. Who operated the vessel? A. Calmar Steamship Corporation.

Q. Would your answers be the same as of November 21, 1941? A. Yes.

Q. So far as you know, who owned the *Portmar* on November 21, 1941 and at all times material in this case up to November 17, 1942 at noon? A. Calmar Steamship Corporation.

822 Q. Was any charter of the *Portmar* made as of November 21, 1941? A. I don't know anything about the date. I understood that there was—that the ship was chartered by the United States Maritime Commission shortly before I left San Francisco.

Mr. Collins: I object and move to strike out the answer on the ground it is hearsay, and counsel knows it is inaccurate. I would be willing to stipulate subject to check that the vessel was under charter agreement, copy of which is attached to the libel in Admiralty No. 129-295.

Mr. Murphy: That is satisfactory.

Q. Did you receive a paper which purported to be a proposed copy of the charter of the *Portmar* to the United States Maritime Commission? A. Yes, sir.

Q. Was that before you sailed on the voyage? A. Yes, sir.

Mr. Murphy: I ask that a copy of the charter of the *Portmar* by Calmar Steamship Corporation to United States Maritime Commission as of November 21, 1941 be marked for identification as Libellant's Exhibit 1.

It is so marked. 824

Q. I show you a paper which purports to be a profile plan and deck lay-out and other particulars of the *Portmar* and ask you if you recognize that paper, that being a photostat copy? A. Yes, sir, that is the *Portmar*.

Mr. Murphy: I offer the plan of the *Portmar* for identification.

(It is marked Libellant's Exhibit 2 for identification.)

Q. What was the *Portmar* doing at San Francisco on November 21 and 23, 1941? A. I don't believe she was there on November 21st, I believe she arrived there either on the 22nd or 23rd. 825

Q. I stand corrected. What was she doing at San Francisco on November 23, 1941? A. She was loading for the Philippine Islands, first over in Oakland and later on at the Army Base in San Francisco.

Q. When did she finish loading? A. As near as I remember it was early in the morning of November 27th.

Q. What was the nature of this cargo that you mentioned? A. I don't know very much about the cargo. All I know about the cargo was what I observed when it was being loaded.

Q. From your observations what was the nature of the cargo? A. High octane gasoline was loaded in Oakland.

When we were over in San Francisco we started to load military equipment, supplies and ammunition.

Q. Did you have a detailed manifest of that cargo after the loading was completed? A. No, sir.

Q. Did you have any kind of a manifest to clear the ship outward? A. Yes, sir, I had a manifest that stated that the *Portmar* was loaded with so many pieces of Army supplies and equipment.

Q. Did it give any details? A. None whatever.

Q. On what date did the *Portmar* sail from San Fran-
827 cisco for Manila, Philippine Islands? A. November 28, 1941.

Mr. Mount: I have no objection if you want to look at the log books for dates.

Mr. Murphy: Counsel for the underwriters returns the deck logs of the *Portmar* which were supplied to Mr. Collins for inspection last week and which were forwarded by Mr. Collins to Mr. Mount.

Q. At the time the *Portmar* sailed from San Francisco did you know the particulars of the insurance which had been arranged by the owner for that vessel? A. No.

Q. At the time the *Portmar* sailed from San Francisco
828 was the *Portmar* seaworthy in all respects? A. Yes, sir.

Q. Was she fully manned, equipped and supplied? A. Yes, sir.

Q. Did you receive any sailing orders as to the voyage from San Francisco to Manila, Philippine Islands? A. Yes, sir.

Q. Whom did you get them from? A. I got them from the Naval Control officer in San Francisco, 12th Naval District.

Q. Were those orders written or oral? A. They were both.

Q. Both written and oral? A. Yes, sir.

Q. Have you got the written orders which were handed to you by the Naval Control officer at San Francisco? A. No, sir.

Q. What became of them? A. I turned them in to the British Naval Control in Suva, Fiji Islands.

Q. Do you remember generally what the written orders told you to do? A. Yes, sir.

Q. What was it? A. They stipulated my course from San Francisco lightvessel for Manila, mentioned a series of points that I had to pass through on my way out.

Q. What did the oral orders say? A. They were secret and I am not allowed to tell you. They were more or less an explanation of the written orders with some clarification and a few special orders. 830

Q. Did you receive any orders as to radio silence? A. Yes, sir.

Q. What was such order? A. That I was to keep radio silence after passing a certain point not very far from San Francisco.

Q. Are you permitted to say what that point was? A. No, sir, I don't believe I am permitted to say so.

Q. Is your reply based on the fact that those orders are secret? A. Yes, sir.

Q. Did you have any passengers on board the vessel when you sailed from San Francisco? A. Yes, sir.

Q. Who were they? A. Three staff sergeants.

Q. What was the function of those staff sergeants on 831 the vessel? A. I don't exactly know. First I thought they were just passengers for Manila. Later I found out that they were also a sort of cargo security officers or at least one of them.

Q. Did any of those three sergeants have any papers relating to the cargo? A. I didn't know so at the time of leaving San Francisco. I found out much later when we got to Australia that one of them had a complete manifest of all the cargo on board the ship.

Q. Did you follow out the orders which were given to you by the United States Navy prior to sailing? A. Yes, sir.

Q. Did anything occur which changed the orders which you received from the United States Navy at San Francisco as to the voyage you were to follow? A. Yes, sir.

Q. What was it? A. The Japanese attack on Pearl Harbor.

Q. What was the first word you had on that subject? A. I heard over the chief engineer's radio about the attack on Pearl Harbor.

Q. After that did you receive any order? A. Yes, sir.

Q. How did you receive it? A. Over the radio.

833 Q. What was the order and from whom did it come? A. It came from the Commandant of the 12th Naval District, San Francisco.

Q. What did it order you to do?

Mr. Collins: I object to that on the ground it is not the best evidence. At this point I will say that in response to the libellant's notice to produce I immediately endeavored to obtain from naval sources an exact copy of the radio message. So far it has not been obtained but it may be eventually obtained before these depositions are completed.

Mr. Murphy: On July 25, 1945 I served a notice
834 to produce on counsel for the United States in Admiralty No. 129-295 calling for production of the original wireless message sent by the Commandant of the 12th U. S. Naval District to the *Portmar* or to the master of the *Portmar* on or about December 11, 1941, with notice that on failure to produce the same secondary evidence of the contents would be offered.

Q. Captain, have you got the ship's copy of that radio message? A. No, sir.

Q. What became of it? A. I dare say that it was lost when the ship was lost at Darwin Harbor, February 19, 1942.

Q. Is that the extent of your knowledge as to the present whereabouts of the ship's copy of that message? A. Yes, sir.

Q. Will you therefore state your best recollection of what that radio message contained?

Mr. Collins: Same objection.

A. Yes, sir. It ordered the *Portmar* and three other ships mentioned by name—I knew the three of them, I had seen them in San Francisco Harbor before we left—it ordered the four of us to go into Suva Harbor in the Fiji Islands and receive further orders and instructions from the British Naval Control at Suva.

Q. Did you obey that order? A. Yes, sir. 836

Q. When did you arrive at Suva? You may refresh your recollection from your log or any other papers you wish to refer to. A. (Referring to log.) December 20th we anchored in Suva Harbor.

Q. Did you report to anyone on arrival at Suva? A. Yes, sir.

Q. Whom did you report to? A. I beg your pardon, I did not report because the man that I was to report to, he came aboard the ship, the British Naval Control officer, he came aboard the ship.

Q. When the British Naval Control officer came aboard the ship did you introduce yourself to him? A. Yes, sir. 837

Q. Do you remember his name? A. Yes, sir, his name was Commander Gray.

Q. Was anyone else present in your conversations with British Commander Gray? A. Yes, sir.

Q. Who was it? A. That was an American Naval Commander observer in the Fiji Islands for the U. S. Navy. His name was also Gray and his rank was also Commander.

Q. Well, we will call them British Commander Gray and American Commander Gray. A. That is right.

Q. Did you confer with both these officers? A. Yes, sir, both of them together, and separately with the American Commander Gray.

Q. Did you receive any orders from British Commander Gray at Suva? A. Yes, sir.

Q. What were those orders? A. To proceed to Sydney, Australia.

Q. Were those orders written or oral? A. Both written and oral.

Q. Have you the written orders which British Commander Gray handed you? A. No, sir.

Q. Where are they? A. I don't know, I turned them in to the British Naval Control officer when I arrived at Sydney.

Q. Was the American Commander Gray present when
839 the British Naval Control officer gave you your orders? A. Yes, sir.

Q. Did he concur in the orders which you were given?

Mr. Collins: I object to the form of the question.

A. Yes, sir.

Q. Did the American Commander Gray hand you anything in writing? A. No, sir.

Q. What did he say? A. He told me upon my questions that it was with the absolute knowledge and understanding of the American authorities that I received those orders from the British Naval Control officer.

840 Q. What were the contents of the written orders that you got from the British Naval Control officer at Suva? A. Directions as to how to proceed through a certain series of points to a point outside Sydney.

Q. Now, you said you got some oral orders from the British Commander Gray? A. Yes, sir.

Q. Was the American Commander Gray present when those oral orders were given? A. Yes, sir.

Q. Did he object to them in any way? A. No, sir.

Q. What were those oral orders that you got from the British Commander Gray? A. They were very much clarification of the written orders, and a few special orders.

Q. Are you able to say what those oral orders were? A. No, sir, they were secret.

Q. Did you follow the orders, written and oral, which you received from British Commander Gray at Suva? A. Yes, sir.

Q. While you were at Suva did you try to send a message to your owners, Calmar Steamship Corporation? A. Yes, sir.

Q. What did you do? A. I asked the two Commanders Gray about how to get a message sent to my owners in New York. I endeavored to get in touch with the American Consul but found out that I could not do it.

Q. Why not? A. I don't believe he was present in Suva 842
the day I was there.

Q. Were you able to send a message to your owner in New York? A. No, sir. They told me it could not be done, it was absolutely out of the question for security reasons.

Q. Did the orders given you by the British Naval Control officer at Suva contain any direction as to whom you should report to when you got to Sydney? A. Yes, sir.

Q. What did they say? A. Mr. Murphy, may I say a word here that I believe I should? I sent two letters from Suva when I found out that I could not send any cablegram.

Q. All right. Now about those letters: Whom did you send those letters to? A. Calmar Steamship Corporation.

Q. What were those letters? A. One was explaining 843
to them that I was in Suva Harbor and had been sent there on naval orders from American authorities and I mentioned also that I was to proceed further on, I did not dare to say where, on British naval orders that I would receive in Suva.

Q. And what was the other? A. One of the men came up and asked me if it would not be possible to increase his allowance that he had left his mother when we left San Francisco, and I told him that I could not do anything about it but I would write the Company a letter and ask them if they would voluntarily increase his allotment.

Q. Did you mail those letters yourself at Suva personally? A. No, sir.

Q. What did you do with them? A. I believe I gave them to one of the two Commanders Gray. There was a third letter also to my wife that was mailed at the same time.

Mr. Murphy: I wish to state on the record that search for these letters in the file of Calmar Steamship Corporation fails to reveal any trace of them. They were apparently never received in New York.

The Witness: Mr. Murphy, another thing that runs into my mind now, I have a copy of the articles
845 up in my hotel and at the time I sent this request for an increased allotment to that man—Steve was his name—I affixed a slip in my own handwriting to the articles.

Mr. Murphy: All right. I will state that if counsel wish us to produce the shipping articles containing the notation which the master has mentioned we will gladly do so.

Q. Now, you testified, I believe, that you were ordered by the British Naval Control officer at Suva to report to the Australian Naval Control officer on arrival at Sydney, is that right? A. Yes, sir.

846 Q. Did you follow the orders which you received from the British Naval Control officer at Suva? A. Yes, sir.

Q. When did you depart from Suva? You can look at any memoranda that you wish. A. On the 22nd in the morning.

Q. December 22, 1941? A. Yes, sir.

Q. When did you arrive at Sydney? A. December 30th anchored in Sydney Harbor.

Q. Did you report to anyone on arrival at Sydney? A. Yes, sir.

Q. To whom? A. First to the British Naval Control.

Q. You said British Naval Control officer—was it British or Australian at Sydney? A. Australian.

Q. What did you do with the written orders which you received from the British Commander Gray at Suva? A. I turned them in at Sydney.

Q. To whom? A. To the Australian Naval Control officer.

Q. Did you get a receipt for them? A. Yes, sir.

Q. What has become of that receipt? A. I don't know, it was lost at the time when the *Portmar* was sunk in Darwin Harbor.

Q. Did you receive any orders at Sydney from the Australian Naval Control officer? A. Yes, sir, they told 848
me how to proceed to Brisbane.

Q. Whom were you ordered to report to on arrival at Brisbane? A. The British Naval Control.

Q. British or Australian? A. Australian.

Q. Naval Control officer at Brisbane? A. Yes.

Q. Was anything said by the Australian Naval Control officer at Sydney about what would be done with your cargo at Brisbane? A. I am not quite certain.

Q. Were those orders written or oral? A. The orders I received from the naval authorities, they were always both written and oral.

Q. Have you the written orders now? A. No, sir.

Q. What did you do with those? A. They were taken 849
up at Brisbane when I arrived at Brisbane.

Q. Did you get a receipt for them? A. Yes, sir.

Q. Have you got that receipt? A. No, sir.

Q. Do you know where it is? A. No, sir, it went the same way as the rest.

Q. Did you see the American Consul at Sydney? A. Yes, sir.

Q. Did he come aboard your vessel? A. I am not quite certain.

Q. You may look at your log to refresh your recollection. On December 31, 1941 is there anything there which refreshes your recollection? A. (Referring to log.) Yes,

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sir, it says 4.15 in the afternoon U. S. Military Attache and Vice Consul aboard.

Q. Did you ask the Vice Consul anything about the orders you were getting from the Australian naval authorities? A. Not at that time when they were aboard ship. I asked the Consul when I was up at the Consulate.

Q. Did you go to the American Consulate on shore? A. Several times. I had to go there to enter and clear.

Q. When you were at the Consulate did you say anything to the Consul about the orders you were getting
851 from the Australian naval authorities? A. Yes, sir.

Q. What did you say? A. I wanted their assurance that it was with their——

Q. Answer the question, please. I asked what did you say to the American Consul. A. I asked "Is it with your full knowledge and approval that I am taking orders here time and again from Australian naval officers as to my route?

Q. And what did he say? A. He said yes.

Q. Did he say anything else? A. I don't remember his exact words. They were all trying to impress upon me that we had to work together and help one another as much as possible.

852 Q. Did he say that you were obliged to follow the orders of the Australian Naval Control? A. Yes, sir.

Q. Did you follow the orders which you received at Sydney from the Australian Naval Control? A. Yes, sir.

Q. When did you leave Sydney? You can look at your log. A. (Referring to log.) Left Sydney on Friday, January 2nd.

Q. What year? A. 1942.

Q. While you were at Sydney did you try to send a message to your owner as to where your vessel was? A. Yes, sir.

Q. What did you do? A. I tried through the Consulate and I tried through my agents, Dalgety & Company. I told the American Consul that I thought it was very important

that my owners should know that I was in Sydney and I asked him if it would be possible for him to see to it that a cablegram could be sent to my owners. I could tell by their attitude that they didn't.

Q. Did the Consul say whether he would send such a message? A. He said it was impossible, it could not be done for security reasons, there was no one of the commercial companies that would dare accept it and it would not pass the military censor and it would never get through.

Q. When did you arrive at Brisbane? A. (Referring to notebook.) January 4th late in the evening.

Q. Were you then at anchor or in berth? A. No, I anchored just off the town. 854

Q. When did you get into berth? A. The following morning, January 5th.

Q. Did you report to anyone on arrival at Brisbane? A. Yes.

Q. To whom? A. The same routine as in Suva and Sydney—I went through the British Naval Control.

Q. You said British Naval Control? A. Well, British more or less takes in Australian—sailors usually say British —well, it is Australian.

Q. Australian Naval Control officer at Brisbane? A. Yes, sir. 855

Q. What did you do with the written orders which you received from the Australian Naval Control officer at Sydney? A. They were taken up.

Q. By whom? A. By the Naval Control officer.

Q. At Brisbane? A. Yes, sir.

Q. Did you get a receipt for them? A. Yes, sir.

Q. What has become of that receipt? A. I don't know. It went the way of the others.

Q. What was done with regard to your cargo at Brisbane? A. The American military authorities at Brisbane took that in hand.

Q. What did they do with it? A. They discharged a large part of the cargo and put it on the dock, re-arranged

and put part of it back again. Also they put part of the cargo that had arrived in Brisbane on other American ships after it had been sorted and classified.

Q. Who did the stevedoring? A. That was Australian stevedores in the employ of the American Army.

Q. Did you have anything to do with the employment of the stevedores? A. No, sir.

Q. Did you make any effort at Brisbane to send a message to your owners as to where your ship was? A. Yes, sir.

Q. What did you do? A. I went through the same thing
857 as I had done in Sydney. I went and saw the American Consul—his name was Ragland, he was a little more sympathetic.

Q. Did the American Consul send a message for you to your owner? A. No, he finally told me that it could not be done but I believe that he made all efforts to get permission for me to send one.

Q. Did you ask your agents at Brisbane to try to send such a message? A. Yes, sir.

Q. Who were your agents at Brisbane? A. Dalgety also—they were my agents also at Sydney.

Q. Did you ask the Americal Consul at Brisbane
858 whether you should continue to follow the orders of the Australian naval authorities? A. Yes, sir.

Q. What did the American Consul say? A. He said yes, absolutely, he gave me several orders himself that proved to me that it was with the full knowledge of the American authorities that I was working under the Australian Naval Control.

Q. In the eighth article of the libel against the underwriters, and I believe in the corresponding article of the libel against the United States, it is alleged that a portion of the cargo was discharged designated by the Australian Naval Control officer at that port. In the light of your testimony do you wish to correct that? A. Yes, sir, I don't believe that the Australian Naval Control had anything to do with the cargo whatsoever. I don't see how that has come in there.

Q. Who was it that gave the orders as to the disposition of the cargo? A. Nothing but American officers.

Q. Did you receive any orders at Brisbane as to what to do after the cargo was re-loaded? A. Yes, sir.

Q. Who gave you those orders? A. The Americans. They told me that I was to go to Darwin with the cargo. The actual orders to go to Darwin and how to proceed in getting there was given to me by the Australian Naval Control officer.

Q. What did he order you to do? That is what did the Australian Naval Control officer order you to do? A. They ordered me to proceed to Darwin. 860

Q. Is that otherwise known as Port Darwin? A. Well, Darwin is a town—Port Darwin is a harbor. It is sometimes confused though.

Q. He ordered you to proceed to Darwin—and what about the cargo? A. I don't know that he mentioned the cargo at all. He probably did, I can't say.

Q. Did he order you to proceed to Darwin after you had the cargo on board re-loaded? A. Yes, sir.

Q. Did he order you to report to anybody on arrival at Darwin? A. Yes, sir.

Q. To whom did he order you to report? A. Australian Naval Control officer at Darwin. 861

Q. Were those orders written or oral? A. Written and oral.

Q. Can you give us the details of the written orders? A. They were just the same as the others I had received. They specified the route I was to take from Darwin and I was given a few oral explanations of how to act under certain conditions.

Q. Can you say what those oral orders were? A. No, sir.

Q. Were they secret? A. Yes, sir.

Q. Did you obey those orders? A. Yes, sir.

Q. On what date did you sail from Brisbane? A. (Referring to notebook) January 9th.

Q. 1942? A. Yes, sir.

Q. Did you proceed according to the orders you had received? A. Yes, sir, until I got as far as Torres Strait.

Q. What happened in the Torres Strait? A. I was ordered by signal to go into the harbor, Thursday Island.

Q. Did you follow that order? A. Yes, sir.

Q. What date did that happen? A. That was January 15th.

Q. When you got into harbor at Thursday Island what happened there? A. I found the American transport *Meiggs*
863 and the Matson Line *Mauna Loa* anchored in the harbor. The Australian Naval Control officer came up and told me that I was to wait with the two other ships until two Australian corvettes would arrive from the south and escort us from there on to Darwin.

Q. Were you ordered to proceed to Darwin from Thursday Island in convoy? A. Yes, sir.

Q. When did you depart from Thursday Island in convoy? A. That was the following day.

Q. What was the date? A. Friday, January 16th.

Q. When did you arrive at Port Darwin? A. Monday, January 19th.

Q. When you got to Port Darwin did you report to
864 anybody? A. Yes, sir.

Q. To whom? A. The Australian Naval Control officer.

Q. Did you surrender the written orders which you had received at Brisbane? A. Yes, sir, I did.

Q. Did you get a receipt? A. Yes, sir.

Q. What has become of that receipt? A. The same as the others.

Mr. Collins: You mean it went down with the ship?

Mr. Murphy: Well, I don't think the captain said it went down because the ship did not go down.

Mr. Collins: He said she was sunk.

Mr. Murphy: She was sunk but she did not go down, as we shall see.

Q. In order to clarify the record as to Mr. Collins' suggestion, Captain, what became of those receipts? A. I don't know. My quarters on the *Portmar* were blasted all to pieces. Most of my records and books and papers were blown all over the ship and all over the harbor.

Q. Did you receive any orders from the Australian Naval Control officer at Port Darwin as to what was to be done with the cargo on the *Portmar*? A. I believe he told me in a general way that the cargo was to be discharged at Darwin but he took me down to the American military headquarters and he introduced me to a Lieutenant Colonel 866
Jones who was in charge of the incoming cargo of American ships at Darwin.

Q. Did you receive any orders from Lieutenant Colonel Jones? A. Yes, sir.

Q. What did he order you to do? A. He told me that as soon as they could obtain a berth for me at the Darwin jetty I would have to go alongside the jetty and discharge the cargo.

Q. It is alleged in the eighth article of the libel against the underwriters and in a corresponding article in the libel against the United States that the Australian Naval Control officer ordered the *Portmar* to discharge the remainder 867
of the cargo at Port Darwin. Do you wish to correct that? A. Yes, sir, that is not quite correct because as to the actual disposal of the cargo I don't believe the Australian Naval Control had anything to do with it whatsoever.

Q. Who gave you the order for the discharge of the cargo? A. Lieutenant Colonel Jones.

Q. Of the United States Army? A. Yes, sir.

Q. At the time you got that order where was the *Portmar*? A. In Darwin Harbor.

Q. Was she at berth or at anchor? A. At anchor.

Q. How long did you lie at anchor? A. Until Saturday, January 31st.

Q. What were you doing while you lay at anchor, what were you waiting for? A. Waiting for a berth at the jetty.

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Q. What did you do on Saturday, January 31st? A. Docked the ship and began to discharge the cargo.

Q. Did you discharge all the cargo on board the *Portmar* at that berth? A. No, sir, not quite.

Q. What did you keep on board? A. About 1500 drums of gasoline.

Q. Who gave you the order to retain those drums on board? A. Colonel Jones.

Q. Again in the eighth article of the libel against the underwriters and the corresponding article of the libel
869 against the United States it is alleged that it was the Australian Naval Control that directed you to retain this gasoline on board. Do you wish to correct that? A. Yes, sir. I was down getting some charts at the Australian Control office and Lieutenant Gollar, he was the Naval Control officer——

Q. He was the Australian Naval Control officer? A. Yes, sir—he says "Captain, I believe you got to get in touch with Colonel Jones as soon as possible, there is a change in things and I believe they are going to send you over to West Australia with gasoline".

Q. Did you go to see Colonel Jones? A. Yes, sir.

870 Q. Did you see anyone else in the American service there? A. I did. On the way down to see Colonel Jones I went up and saw the American naval observer, Commander U. S. Navy Collins.

Q. What did you say to Commander Collins? A. I told him that I did not like to be ordered about by foreign naval authorities. I told him that sending a ship as big and heavy as the *Portmar* to Western Australia when there were several small British and Australian ships in the harbor that were much better fitted for the voyage than the *Portmar* was was not the right thing to do.

Q. What did he say? A. Commander Collins told me that—his exact words I don't remember but he brought out the same as the other Americans had done, that it was necessary that we all cooperate and do the best we could

because the situation was desperate and things had to be done and they had to be done as quick as possible and the *Portmar* was the handiest ship to send at the present moment.

Q. What did you do then? A. I went down to Colonel Jones for further orders.

Q. What orders did he give you? A. He told me that he had received orders that 2000 drums of gasoline was going to be sent to Wyndham, Western Australia.

Q. What did he tell you to do? A. They had just shortly beforehand found out that there was only 1500 or about 1500 left in the ship so it would be necessary to re-load a certain amount to make up the full 2000 drums. 872

Q. Pursuant to that order did you re-load 500 drums? A. I don't know the exact amount. We loaded until we had 2000.

Q. While you were at Port Darwin did you note a protest before any authority there? A. Yes, sir.

Q. I show you a paper and ask you if that is a copy of the protest which you noted? A. Yes, sir, that is the one.

Q. Have you the original of that? A. No, sir, the original was kept by the notary, I take it.

873

Mr. Murphy: I offer this protest for identification as Libellant's Exhibit 3.

It is so marked.

Q. There is some handwriting on the back of this paper, Libellant's Exhibit 3 for identification. Is that in your handwriting? A. Yes, sir, I wanted the seal, I had never seen a protest without a seal on it and he wouldn't give me any so he explained to me that it was just as good without the seal as it would be with a seal. I just made a notation in case people should ask me about it later on.

Q. Do you remember whether you mailed the original of that protest to anybody? A. No, sir, I did not because

I didn't have any mailing privileges anyway, they wouldn't let me send anything in the mail, they told me that there was no such thing as mail at Darwin.

Q. Did I understand you to say that the original remained in the possession of the notary? A. Yes, sir.

Q. Mr. Nichols at Port Darwin? A. I forget his name—(referring to Exhibit 3) yes, sir.

Q. How did this paper get back to New York? A. It was sent home with the chief mate.

Q. Who discharged the cargo of the *Portmar* at Port
875 Darwin? A. Australian stevedores working for the American Army.

Q. Did you employ them? A. No, sir.

Q. While you were at Port Darwin did you endeavor to send any message to your owner as to where your ship was and where she was going? A. Yes, sir.

Q. What did you do? A. I went and saw the commanding officer, Colonel Robinson. When first we arrived he was Robinson. I believe he was, in fact I know that he was relieved before we had been there very long, I don't know exactly when.

Q. All right, that is not important. What I want to get
876 at is what did you do to send a message to your owners about where your ship was and what she was doing? A. I asked him if they would send a message for me to my owners in New York.

Mr. Collins: Asked whom?

Q. Whom did you ask, Mr. Collins wants to know. A. I asked the commanding officer and afterwards several of the communication officers, their names I can't remember.

Q. American or Australian? A. American.

Q. What did they say? A. They said that it was absolutely impossible, any messages sent out of Darwin had to go by land line to Melbourne and the line they had couldn't take care of half of what they had to send and further-

877

more for security reasons I would never be allowed to sent it.

Q. Did you receive orders then to sail for Wyndham, Australia? A. Yes, sir.

Q. And whom did you get those orders from? A. I got them from the Australian Naval Control.

Q. And what instructions did you get from the Australian Naval Control officer as to what you were to do on arrival at Wyndham? A. I was to discharge the gasoline that I had on board and when I had so done to return to Darwin.

878

Q. Did the Australian Naval Control officer at Port Darwin order you to report to anybody on arrival at Wyndham? A. No, sir, I don't believe he did. I was told who to turn the gasoline over to.

Q. And who was that? A. That was a manager of a big slaughter house they had in Wyndham.

Q. Were the orders given to you at Port Darwin to go to Wyndham and return to Darwin? A. Yes, sir.

Q. Were they written or oral? A. Both written and oral.

Q. Were you given any instructions regarding any contact with the postmaster at Wyndham? A. No, sir. I believe it was mentioned that the postmaster at Wyndham, he was a representative of the Australian Navy there also, he was a police sergeant and postmaster, everything rolled into one.

879

Q. You received no orders regarding reporting to him, did you? A. No, sir—just a minute, I believe though that it was mentioned to me that he was the only public official there was in Wyndham.

Q. When did you sail from Port Darwin for Wyndham? A. That was February 4th.

Q. Were you ordered to proceed in convoy? A. Yes, sir.

Q. What was your escort? A. A little Australian corvette.

Q. Do you remember her name? A. I believe her name was the *Swan*.

Q. Did you arrive at Wyndham? A. Yes, sir.

Q. What date? A. Sunday, February 8th.

Q. What did you do there? A. The fellow that was going to see to the stevedoring of the gasoline and give me a receipt for the gasoline, he came aboard and they started to discharge the gasoline.

Q. Did you hire the stevedores to discharge the gasoline? A. No, sir, this was a complicated affair. I had been given
881. a pilot along to take me from Wyndham entrance and up to Wyndham. He was a Captain Gregory of Darwin. He had been entrusted by the American military authorities with hiring and paying the stevedores in Wyndham. I found out later on when I got to Wyndham that the population in Wyndham would not have anything to do with Captain Gregory whatsoever.

Q. Well, may we put it that the stevedoring was arranged by someone other than yourself, or did you finally have to arrange the stevedoring? A. I had to be in it anyway. I can't say that I——

Q. Well, just tell us what you did. A. I went and spoke
882. to the stevedores about this gasoline we had and I told them that they had a flying field a few miles away from the beach there they had no gasoline and that unless the gasoline was taken up there there wouldn't be much protection for them when the Japanese came and I told them that their likes or dislikes of Captain Gregory had nothing to do with the case whatsoever. I wanted to get the gasoline out of the ship and return to Darwin as soon as possible. They finally consented that they would discharge the gasoline if Captain Gregory was kept out of the picture as much as possible—they wouldn't have any personal doings with him.

Mr. Collins: It seems to me this is somewhat immaterial.

Mr. Murphy: Well, perhaps it is.

883

Q. Let us put it this way, Captain: Who paid for the stevedoring? A. I take it the American Army had given Captain Gregory money along to pay them.

Q. Let me put it this way: Did you pay for it? A. No, I did not pay for it.

Q. Did any agents of yours pay for it? A. No, sir, not unless you look upon Captain Gregory as——

Q. Well, was Captain Gregory the agent of your owner? A. He had helped me when I came to Darwin first, yes.

Q. Whose money did he use in paying for it? A. I don't know.

884

Q. Did you surrender your orders when you got to Wyndham? A. No, sir.

Q. What did you do after the cargo of gasoline was discharged at Wyndham? A. Returned to Darwin.

Q. What did you do there with the written orders which you received on departure from Port Darwin? A. Turned them back to the Australian Naval Control.

Q. Did you get a receipt for them? A. Yes, sir, I believe I did.

Q. Have you got that receipt now? A. No, sir.

Q. If you got a receipt what has become of it? A. It went the same as the rest of them.

885

Q. On what date did you sail from Wyndham back for Port Darwin? A. That was Tuesday, February 10th.

Q. And when did you arrive at Port Darwin? A. Thursday, February 12th.

Q. Did you come to anchor in Darwin or did you go right to a berth when you got back there? A. I anchored.

Q. Did anything occur at Port Darwin which required you to go anywhere else in the *Portmar*? A. Yes, sir.

Q. What was it? A. On the night between February 12th and February 13th the Australian Naval Control officer came out in the middle of the night and told me to be ready to dock the ship at daylight.

Q. Did you follow that order? A. Yes, sir.

Mr. Mount: Who was he?

Q. What was his name? A. Lieutenant Gollar.

Q. When did you berth? A. Early in the morning.

Q. Of February 13th? A. Yes, sir.

Q. Did you receive any instructions as to what was to be done with the ship? A. Yes, sir.

Q. What was it? A. I went up to see Colonel Jones and he told me that the commanding officer, he had given orders that four ships were to be sent from Darwin to Koepang on Timor Island with troops and military equipment and the *Portmar* was one of the selected ships.

887 Q. Did Colonel Jones give you any instructions about cargo to be loaded on board your ship? A. In a general way, yes. He told me that first all the stores, equipment and supplies would come aboard and finally the troops would be the last to arrive on board the ship.

Q. Was anything done about loading the *Portmar* on February 13th? A. Yes, we began loading.

Q. What did you load? A. Military stores, supplies and equipment, ammunition.

Q. Was there any materiel? A. Yes, there was also materiel.

Q. Were there any guns put on board the *Portmar*? A. Yes, sir, 75 calibre field guns of the 148th Field Artillery
888 was put on board.

Q. Were any personnel taken on board? A. Yes, sir.

Q. Did you finish the loading on the 13th of February? A. No, sir.

Q. Did you load on the 14th also? A. Yes, sir, we did.

Q. About how many men came aboard the vessel as passengers? A. I am not quite certain. I believe it was between three and four hundred.

Q. Officers and men? A. Officers and men, yes, sir.

Q. Did you receive any orders as to where you were to proceed with that cargo and how you were to proceed? A. Yes, sir.

Q. What were those orders and when did you get them? A. After all the cargo and the troops were loaded I received orders to go on board the American cruiser *Houston*.

Mr. Collins: May we ask from whom he got the orders?

Mr. Murphy: Yes.

Q. From whom did you get the orders to go aboard the *Houston*? A. I got the orders from the Australian Naval Control.

Q. Did you comply with that order and go on board the cruiser *Houston*? A. Yes, sir.

Q. Did you meet anyone there? A. Yes, sir.

Q. Who? A. I met the masters of the three other ships that with me was going to form the convoy. I met the 890
Australian Naval Control officer, Lieutenant Gollar and one of his officers. I met the commander of an American destroyer, either the *Preston* or the *Perry*, I forget which, and there was a couple of Australian commanding officers of Australian corvettes. Presiding at this meeting was Captain Rooks of the *Houston*.

Q. Were any orders given to you at that conference as to what you were to do? A. Yes, sir.

Q. What were the orders and who gave them? A. The orders were handed to each of us by Lieutenant Gollar. Then we sat down and Captain Rooks explained the orders to us and explained the procedure in getting to Koepang. 891

Q. Did you obey those orders? A. Yes, sir.

Q. What were the other ships in the convoy? A. The other ships in the convoy was an American transport *Meiggs*, the Matson liner *Mauna Loa*, the Australian motorship *Tulagi*, and the *Portmar*.

Q. And what was the military escort of the convoy? A. The U. S. Cruiser *Houston*, the U. S. Destroyers *Preston* and *Perry*, and I believe four Australian corvettes, one of them being the same one that had taken me to Wyndham a few days previous.

Q. When did the convoy set sail? A. Just after midnight on the 15th.

Q. Suppose you state the time, Captain. A. The time was 1.09 on the morning of February 15th.

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Q. Captain, it appears in the tenth article of the libel against the underwriters in this case that at 1.30 P. M. of February 15th the *Portmar* left Port Darwin in convoy as you have described. Do you wish to correct that? A. Yes, sir, that is not so.

Q. That should be 1.30 A. M. of February 15th? A. The exact facts are we hove up anchor and proceeded at 1.09, and at 1.30 we passed out through the boom gate.

Mr. Murphy: Then the libel is corrected accordingly and I take it that it is understood in this cor-
893 rection and in the other corrections noted this morning that I will move to conform the pleadings to the proof in the instances where the allegations are inaccurate.

Q. At 1.30 A. M. you passed through the boom gate, Captain? A. Yes, sir.

Q. Out into the Timor Sea? A. Yes, west through Clarence Strait and out into the Timor Sea.

Q. Did anything occur while crossing the Timor Sea which interrupted the voyage? A. Yes, sir.

Q. What was it? A. Around noon we were spotted by
894 two Japanese planes.

Q. Did those planes attack the convoy? A. Yes, sir, they attacked the convoy and we were ordered to disperse.

Q. Who ordered you to disperse? A. The commanding officer.

Q. Of what ship? A. Of the *Houston*.

Q. Was he the Commodore of the convoy? A. No, sir, he was the commanding officer of the convoy.

Q. Tell us what the Japanese planes did. A. The Japanese planes threw a few bombs at us and when they had no more bombs left they disappeared to the north.

Q. Did any of the bombs fall near the *Portmar* in that attack? A. No, sir.

Q. Was the *Portmar* damaged in any way in that attack? A. No, sir.

Q. Did the convoy re-assemble? A. Yes, sir, the convoy was ordered to form up again and we proceeded on our course to Koepang.

Q. Did you continue that voyage during the night of the 15th and 16th? A. Yes, sir.

Q. Did anything occur on February 16th which interrupted the voyage? A. Yes, sir.

Q. Tell us what happened on February 16th. A. There was a squadron of Japanese bombers came in from the north and attacked the convoy for about an hour. As soon as they were sighted the convoy was ordered to disperse. 896

Q. When did that attack begin? A. It says in the log-book from 11.20 to 12.15—fifty-five minutes.

Q. Now tell us what happened—you say the convoy was ordered to disperse? A. Yes, sir.

Q. Can you estimate the number of bombers that were in that attack squadron? A. There were 27—when first they came in they came in in formation. Later they spread out attacking the different ships in the convoy. The commanding officer of the troops aboard the *Portmar*, he had set up four machine guns, they were little Browning 30 calibre guns—two forward and two aft.

Q. Did the escort vessels put up any anti-aircraft fire? A. Yes, sir, they did. 897

Q. Were they sufficient to fight the Japs off? A. No, sir, it was not.

Q. Did any bombs fall near the *Portmar*? A. Yes, sir.

Q. Were you taking any precautions so to maneuver your vessel as to avoid the bombs? A. Yes, sir.

Q. What were you doing? A. I was trying to always keep my ship athwart of the course that the bombers coming in were steering so as to give them as little a target as possible.

Q. That is you were trying to present the beam of your ship to the line of the bombers' course rather than her full-length, is that right? A. Yes, sir, that's right.

Q. Now will you describe the fall of the bombs in your own words and according to your own recollection, the

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distance from the ship and the number of bombs that fell near the *Portmar* during that attack and what effect they had? A. I saw a plane coming in from astern over the *Portmar* and I saw her drop a bomb which fell just astern of the *Portmar*, it fell so close that it threw the water over the poop to mast height. I felt the engine racing and I thought we had lost the propeller. A little later on I felt the propeller taking hold of the water again so I knew that we had not lost the propeller.

Q. Where were you standing when you saw that bomb
899 fall aft of the *Portmar*? A. Navigating bridge.

Q. Which side? A. Port side of the bridge.

Q. Is that the open wing of the bridge? A. Yes, sir.

Q. Could you see aft along the port side of the ship? A. Yes, sir.

Q. Go ahead. A. A little later on I saw two more bombers coming in on the port quarter. They each let go a bomb but they hit the water at a considerable distance, say about half the length of the ship, from the port quarter of the *Portmar*.

Q. Did those bombs seem to do any damage to the *Portmar*? A. I could feel the concussion but I don't believe that the bombs did any harm to the ship.

900 Q. That is those two bombs? A. That is those two last ones.

Q. All right, go ahead, Captain. A. Then three more bombers came in from astern and they laid a stick of bombs alongside the port side of the ship parallel to the ship. They were only a very short distance away, they were only at the most twenty or thirty feet away from the ship's side.

Q. How many bombs in that stick that you mentioned? A. Six.

Mr. Collins: Excuse the interruption: You mean the bombs were twenty or thirty feet away, not the planes?

The Witness: Yes, sir.

901

Q. You mean they hit the water about twenty or thirty feet away from the port side of the ship? A. Yes, sir, in a line parallel to the side of the ship.

Q. Port side? A. Yes, sir.

Q. Tell us what the effect of those bombs was on the *Portmar.* A. They almost lifted the ship out of the water. They threw the water over the full length of the ship to mast height and I remember that I expected to see everything washed away from deck.

Q. Where were you standing at the time that happened? A. Port side of the bridge.

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Q. Were you out on the open wing of the bridge? A. Yes, sir.

Q. Could you feel any shaking of the vessel from the concussion of those bombs? A. Yes, sir, felt as if she had hit a rock.

Q. What did you do then? A. When I saw more bombers coming in it looked like they came in from the starboard quarter so I walked through the wheelhouse and out the starboard wing of the bridge. Just when I came out the starboard wing they laid a stick of another six along the starboard side. They were also parallel to the ship but they were possibly a little further off the ship's side than the ones I have just described on the port side.

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Q. About how far away were these starboard side bombs? A. Oh, I would say thirty or forty feet.

Q. All this time were you doing anything about maneuvering the vessel with respect to the course of the bombers? A. Yes, sir.

Q. Were you doing everything you could to keep the course of your ship across the course of the bombers? A. Yes, sir. The ship was slow in handling and slow in maneuvering and it wasn't always possible to get her athwart of their course.

Q. Were the bombers coming in from one direction or many directions? A. They were coming in from all directions, bombers all around.

904 Q. What was the effect of those bombs that fell off the starboard side of the *Portmar*? A. Well, again they deluged the ship with water from fore to aft and shook the ship very severely but I don't believe it was quite as much as the ones that had previously fallen on the port side.

Q. Did any more bombs fall near the *Portmar* after that? A. Yes, sir.

Q. Where? A. The next one fell forward.

Q. Where were you when the bombs fell forward? A. On the navigating bridge.

905 Q. Did you see the bombs coming down? A. Yes, sir.

Q. Did you form any judgment as to what those bombs were going to do when you saw them coming down through the air? A. Well, it always looks as if they are going to hit your ship.

Q. Where did they hit? A. This one hit just ahead of the stem of the ship.

Q. What was the effect of that on the vessel? A. It shook the vessel and threw water over the forward end of the ship.

Mr. Collins: You might ask him what he means by "just ahead".

906 Q. What do you mean by just ahead of the stem of the ship, Captain—can you estimate the distance? A. Well, that was 200 feet from me to the stem of the ship—I can't say.

Q. As it looked to you was it very close? A. As it looked to me it just cleared the stem—that may have been twenty feet off, I couldn't say.

Q. Was there another bomb that fell forward in that same area? You only described one bomb—was there another bomb that fell forward? A. No, sir, not that I remember.

Q. There was one bomb forward? A. There was one bomb forward, that was all I saw.

Q. Now, did any other bombs fall near the *Portmar*? A. Yes, sir, just as soon as this had happened I saw a plane coming from the port beam that swung up in the wake of the ship and dropped another stick of bombs alongside the starboard side of the ship.

Q. About how far away? A. Well, they were the furthest away of any of those three sticks—I would say they were over fifty feet away from the ship.

Q. And what did you observe as to the effect of that group of bombs off the starboard side of the ship? A. Well, I felt the concussion and I felt they shook the ship up but it was at least less than I had felt from the two other sticks 908 of bombs.

Q. During all this time did the military personnel on board the vessel maintain anti-aircraft fire with their machine guns? A. Yes, sir, they did.

Q. Was it effective? A. No, sir, there were only small machine guns and the bombers were at a considerable height and it seemed it had no effect whatsoever.

Q. In that last stick of bombs, how many was it that fell fifty feet off the starboard side of the ship? A. Six.

Q. Whenever you say stick you mean six? A. In this case.

Q. This morning I mean. A. They were so easily 909 counted because when the water churned up after the explosion of the bombs every second one was yellow and every second one was white—it was white, yellow, white, yellow, white, yellow.

Q. They were evenly spaced in that order? A. Evenly spaced in that order.

Q. So in this bombing attack we have three sticks of bombs, one on the port side and two on the starboard side? A. That's right.

Q. And one bomb forward? A. Yes, sir.

Q. Now, I call your attention to the fact that in a protest you later noted at Melbourne, Australia, which we will come to later on, you stated that after the first

stick of bombs fell on the starboard side that a little later you observed two bombs falling forward of the ship so close as to appear that they would inevitably hit the ship's bow, that such bombs fell just short of the bow dead ahead and the snip was again damaged with water from the explosions. Refreshing your recollection from that—do you wish to look at that to refresh your recollection—and I also call your attention that the same statement appears in your protest made before the United States Consul at Melbourne. In view of that do you wish to increase the
911 number of bombs which you observed to fall forward from one bomb to two bombs? A. There is but little doubt that at the time that protest was being extended I remembered better than I do now. Things have slipped my memory perhaps a little, not very much. It is barely possible that it was two instead of one.

Q. All right. Your present recollection is that there was one bomb? A. Yes, sir.

Q. But in March 1942 you entered protest and said that there were two bombs and that may be more accurate than your present recollection? A. I wouldn't dare to say not.

Q. Now, you have said that this attack terminated at
912 12.15 P. M. After that attack did you call for reports as to the condition of your vessel? A. Yes, sir.

Q. Whom did you call upon for reports? A. I was very much concerned about the state of the vessel and I asked the chief mate and the chief engineer to let me know what had happened to the ship in their respective departments.

Q. Did you observe anything yourself as you stood on the bridge about the condition of the vessel? A. I did.

Q. What did you observe? A. I observed the ship going full ahead, she did not have the natural vibrations that she always had had when I had been aboard her.

Q. Are we to understand that you found that the vibration of the ship had changed? A. Yes, sir.

Q. What did that indicate to you? A. Well, it indicated to me that she had been severely injured in her structure.

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Q. What reports did you get from your chief mate and chief engineer as to the condition of the ship? A. The chief mate was down in the hold and he told me that there were signs of paint and rust having broken loose from the side of the ship where the plates laid over the frames in No. 5 hold, No. 4 hold, in the shelterdeck and also in No. 3 hold forward of the bridge. The chief engineer said that he had noticed the same thing down in the engines. The chief also told me that——

Q. By chief you mean chief engineer? A. The chief engineer, yes, he also told me that when the first stick of six fell along the port side he had noticed that the pumps and auxiliaries in the engineroom had moved on their foundations and settled back again. He said that the port boiler showed signs of having moved in the saddle. The chief mate told me that he had had the carpenter sound the bilges and they had showed not much more water than he had had earlier in the morning when he had made soundings in the morning. The chief engineer told me also that he had observed a leak into the shaft alley from the afterpeak and that some of his bilge lines had been broken off.

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Q. Were those in the way of the port boiler, under the port boiler? A. He told me something about bilge lines under the port boiler, yes, sir; bilge line connections under the port boiler.

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Q. He reported to you that they were broken? A. They were broken or out of order so they could not be used.

Q. Did he report to you anything about the bilge line to No. 5 hold? A. Yes, sir, he did.

Q. What did he say about that? A. He reported that it had been fractured and he said that all over the ship the bilge lines were so full of paint and scale that it was not much good pumping before he had gotten them repaired. He immediately went to work repairing his bilge lines.

Q. Did he report that the paint and scale was paint and scale that had been shaken down by the vibration of the bombing? A. Yes, sir.

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Q. Did he report anything about the asbestos covering on the piping in the engineroom? A. Yes, he said all the asbestos in the engineroom had fallen off and I had occasion later on to look down in the engineroom and it looked like it had been a snow squall had been hitting everything down there, everything was white with asbestos that had fallen down.

Q. Did the chief engineer report that that had occurred when that port side stick of bombs fell close to the vessel? A. Yes, sir, he said most of it had been then.

917 Q. When those six bombs fell close to the port side? A. Yes, he said they had felt that more than they had felt the two sticks later on on the starboard side.

Q. Did the convoy resume course after that attack? A. Yes, sir, we got orders from the *Houston* to assemble again and form up in formation and we proceeded on our course to Koepang.

Q. Did you continue on that course very long? A. No, sir, about two hours afterwards the *Houston* sent signals that we were going to return to the port of departure.

Q. Did you proceed directly back to Port Darwin or did you go somewhere else first? A. No, sir, we steered a course more to the westward than the course for Darwin.

918 Q. Where did you meet up with the land? A. Down in Cambridge Gulf at the Wyndham entrance.

Q. And how did the convoy proceed from there? A. From there on we proceeded in shallow water all the way to Darwin.

Q. On what day did you arrive again at Port Darwin? A. On the 18th.

Q. At what time of day? A. That was about noon.

Q. Did you come to anchor or did you go to a pier? A. We went to anchor.

Q. And at what time did you anchor, Captain? A. I don't remember the exact time.

Q. You can check it from your log—February 18, 1942? A. (Referring to log) Let go starboard anchor 12.55.

Q. P. M.? A. Yes, sir.

Q. On February 18, 1942? A. Yes, sir.

Q. Who indicated the position at which you dropped that anchor? A. The Australian Naval Control officer told me where to anchor.

Q. And did you anchor where he told you? A. Yes, sir.

Recess taken to 2:30 P. M.

After Recess, 2:30 P. M. 920

Present as before.

AXEL MICHELSON resumes the stand.

Direct examination continued by Mr. Murphy:

Q. Captain, we were up to the point where you had come to anchor at a position directed by the Australian Naval Control officer at 12:55 P. M. February 18, 1942 in Darwin Harbor after returning from the Timor Sea. Have you the bearings of that anchored position? A. Yes, sir, I have the position and I have a couple of bearings. 921

Q. Will you read off what the bearings are from your notes? A. (Reading from notes.) The bearings from the anchorage were Fort Point Lighthouse bearing 42 degrees.

Q. Was that true? A. Always true.

Q. 42 degrees—distant how far? A. About 9200 feet—and Emery Point Lighthouse 342 degrees, 13,750 feet.

Q. 13,750 feet distant? A. Yes, sir.

Q. Will you lay those bearings on this chart? A. (Laying bearings on chart) Leaves the ship in a position 12, 29½ south and 130, 49½ east.

Q. Those are the readings of your anchored position, are they—the latitude and longitude? A. That is the position the ship was in from the bearings.

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Q. Will you plot that position on this chart? A. Yes. That should be it (marking chart).

Q. I will ink over the black pencil lines which you have drawn, making a cross with a leader marked "*Portmar* anchored 12:55 P. M. February 18, 1942". Did you report to the Australian Naval Control officer after arrival at anchorage at Port Darwin? A. No, sir, he come alongside the ship in a launch.

Q. Did you receive any orders from the Australian Naval Control officer on that occasion when he came alongside? A. No, sir, not direct orders. He told me that he would let me know as soon as possible what would be the next steps I would have to take.

923

Q. Did you later on get word as to where you were to go with all the troops and materiel on board your ship? A. Yes, sir, in the evening he come alongside the ship again in his launch and told me to dock the *Portmar* the next morning at daylight.

Q. Did you berth the vessel the next morning pursuant to that order? A. No, sir, just about daylight with the ship almost ready to move they came alongside again and told me to remain where I was until further orders.

924

Q. Did you remain there in accordance with that order? A. Yes, sir.

Q. Tell us what happened on the morning of February 19, 1942. A. Well, shortly after the launch had left there was a ship left the jetty—I forget which one it was, I believe it was either the *Meiggs* or the *Mauna Loa*—and his place, that we were to have taken, was taken up by an Australian mail steamer, the *Neptune*. She started to discharge cargo at the jetty.

Q. Then what happened to you and your vessel? A. I had told the chief engineer and the chief mate that I was fairly certain that the Japanese would attempt to get us in the harbor that day and I had told them to have everything ready to move at a moment's warning.

925

Q. Go ahead, in your own words tell us what occurred that morning. A. About 10 o'clock, I believe it was five minutes before 10, I was on the bridge—in fact I was on the bridge all the morning watching developments and seeing what was going on. A few minutes before 10 o'clock I could hear the roar of planes in the southwest and shortly afterwards I could see swarms of them in my binoculars coming in over the harbor.

Q. Did those planes attack the harbor and the vessels in the harbor? A. Yes sir.

926

Q. When they attacked was the *Portmar* at the same anchorage that you have plotted on this chart? A. Yes sir.

Q. How was the weather? A. The weather was fair, light airs.

Q. How was the visibility? A. Visibility was good.

Q. And where were you when you observed these aircraft coming in from the southwest over the harbor? A. On the navigating bridge.

Q. Which side? A. I believe I was on the port side.

927

Q. Now, from there on will you tell us how the attack developed and what occurred? A. I saw them coming over the ships in the harbor and going over the jetty to the town. I saw them let go their bombs when they went over the jetty and I saw a British steamer, British motorship, back out from one side of the jetty, she was afire, and she later on sunk in the harbor. Then I saw planes that had been up over town come back to the jetty and they let go bombs on the *Neptune* and I saw the *Neptune*, she blew up just as soon as the bombs hit, she was lifted clean out of the water and decks and everything in her came out of her and she turned over on her side and sunk alongside of the jetty. The next bombers went after the two American destroyers, the *Preston* and the *Perry*—they had remained in the harbor because they were out of fuel oil and they had to be fueled overnight. The *Houston*, she had left Darwin just as soon as she took us to the entrance the previous day.

The two destroyers when the bombers came in they were both at anchor. I saw them bomb the *Perry* and she blew up just like the *Neptune,* I could see her lifted clean out of the water and burst into a thousand pieces. Then they went after the *Preston* and the last I saw of the *Preston* she was blazing from the forward smokestack aft.

Q. Up to this time had there been any direct attack on the *Portmar*? A. No sir.

Q. How was the *Portmar* heading at that time lying at anchor? A. She was heading nearly south, maybe a point
929 either way of south, I cannot say for certain.

Q. Go ahead, what happened next? A. Next after they had blown the *Perry* up, set fire to the *Preston*——

Q. After they had blown the *Preston* up and set fire to the *Perry*? A. No, it was the other way, the *Perry* blew up.

Q. The *Perry* blew up and the *Preston* was set on fire? A. That's right. After the two destroyers were done away with they came up in the harbor bombing ship after ship. First they took the ships nearest to the shore.

Q. Let me ask you a question here: Was there any counter-aircraft at all, were there any aircraft in the air fighting those Japs? A. No sir.

930 Q. Did they have everything their own way? A. I never saw one.

Q. Was there ever any anti-aircraft fire? A. Very feeble. After the *Preston* and the *Perry* were done away with there was none of the ships in the harbor were armed or what they were armed with was just light machine guns like we had, that was all, no use against aircraft. They had a little anti-aircraft ashore but that was silenced in no time at all.

Q. Did the Japanese aircraft come after the *Portmar*? A. Yes, sir.

Q. Will you describe in as much detail as your recollection will permit the manner in which they attacked the *Portmar*? A. It seemed that it was fighters that came after us first. They would attack us from the east, come down

with the sun, machine gun us as they went across us. They would give us all their machine gun and cannon fire as they went over the ship and then they would swing back and come down on us again. It took a little time before the bombers came. There was a bomber dropped a bomb that I believe went through one of the lifeboats that were swung out on the port side—the lifeboat almost completely disappeared, and so did the lifeboat that was hanging ahead of it. This was the aft one they hit.

Q. Just a word about those lifeboats: Did you give the chief officer any order with respect to those lifeboats before this attack occurred? A. Yes, sir, as soon as I saw the Japanese coming I ordered him to lower all his lifeboats to the level of the maindeck. 932

Q. Where are those lifeboats regularly stowed on the *Portmar*? A. On the boat deck.

Q. Looking at Libellant's Exhibit 2 for identification, please indicate the boat deck? A. (Indicating) That is the boat deck.

Q. This deck here (indicating)? A. Yes.

Mr. Murphy: I will draw an arrow to that line and mark it "Boat deck".

933

Q. Is that correct? A. Yes—no sir, that is not correct, this is the deck (indicating).

Q. All right, the one above that? A. Yes.

Mr. Murphy: I will rub out the arrow and change it so that it points to the deck just under the words "Wireless house".

The Witness: That's right.

Mr. Murphy: And on that I have written "Boat deck".

Q. How many lifeboats did the Portmar carry? A. Four.

Q. How many on each side? A. Two on each side.

934 Q. So that the two lifeboats you are describing which were affected by this first bomb that dropped alongside the ship were those on which side? A. That was the aft boat on the port side.

Q. That was destroyed? A. It completely disappeared.

Q. And what happened to the forward lifeboat on the port side? A. The forward one on the port side was split in two parts along the keel from forward to aft.

Q. Did that bomb explode alongside the vessel? A. Yes, sir.

935 Q. At about what point alongside the vessel? A. Well, it must have been at or very close to the plating in the aft end of the engineroom in the port side.

Q. Suppose you mark on that chart about the point opposite which that bomb exploded, use the profile at the top.

(Witness marks the chart.)

Mr. Murphy: Witness makes a star.

The Witness: You will understand, gentlemen, that this is a profile from the starboard side and this thing happened on the opposite side, on the port side.

Mr. Murphy: Right.

936 Q. Now will you make a corresponding mark on the plan below which would show the point of that explosion viewed from above? A. Here is the engine-room, I would say about here (marking plan).

Q. Now, that mark you have just made, does that relate to the plan above it or the plan below it? A. Well, this is the line as far as that goes (indicating).

Q. Well, are you making the mark with relation to this plan or that plan (indicating)? A. The lower plan.

Q. That second mark I will put an arrow then—I will make one of your marks an arrow pointing to the lower plan? A. That's right.

Q. Is that mark supposed to illustrate the point of explosion of the bomb in the water alongside the vessel on the port side opposite the engineroom? A. Yes, sir.

Q. Now, this was the first bomb that was dropped that morning, was it? A. On the *Portmar*, yes, sir.

Mr. Murphy: I will put a leader "First bomb 2/19/42" and a corresponding mark "First bomb 2/19/42".

Q. Now, that is the first bomb. Now will you go on with your story and tell us what happened from there on? A. 938
A little later on they came along again. I was on the port wing of the bridge and they dropped a bomb only a few feet from the ship right abreast of the bridge.

Q. What side? A. On the port side also.

Q. A second bomb on the port side? A. Yes, sir.

Q. Now, will you likewise illustrate, using this lower plan or using the second plan down which will show the bridge—show us where the second bomb hit?

(Witness marks plan.)

Q. Is this second mark you have made supposed to relate to the plan below it? A. Yes, sir. 939

Q. It being on the port side? A. Yes, sir.

Mr. Murphy: Then I will mark this with an arrow pointing downward and also a leader marked "Second bomb 2/19/42".

Q. This second mark you have made for the second bomb is supposed to be in line with the navigating bridge throughout all these plans as they are laid out on this? A. Yes.

Q. But in the water on the port side below the navigating bridge? A. Yes, sir.

Mr. Collins: I don't think the witness has stated how far off the ship either bomb dropped.

940 Q. All right, Captain, will you in response to Mr. Collins' question tell us how far away from the side of the ship did the first bomb fall on the port side in the way of the engineroom? A. If the first bomb in the way of the engineroom went through the lifeboat and almost struck the deck it must have been less than twelve feet from the ship.

Q. You have put your answer in the form of a conclusion. Did you see the bomb fall in the water alongside the ship? A. Yes, sir, I did, I saw the explosion.

941 Q. You saw the explosion? A. Yes, sir.

Q. Did you see the column of water fly up? A. Yes, sir.

Q. How close to the ship was that column of water? A. Well, it was held back by the side of the ship because it was almost alongside the side of the ship.

Q. Now as to the second bomb you have indicated which fell in the way of the bridge on the port side, how close to the ship did that bomb fall? A. Less than twice as far away.

Q. Will you estimate that in feet? A. Say fifteen, twenty feet.

Q. Were any more bombs dropped on or near the *Portmar* in the attack of February 19, 1942? A. No, sir.

942 Q. Now will you describe the events as they followed after those bombs were dropped? A. We had a fire in No. 4 hold——

Q. Hold on a moment. I want to ask you a question about the chief officer. You testified that you ordered him to get the lifeboats swung out, right? A. Yes, sir.

Q. And you ordered the lifeboats lowered to the level of the maindeck? A. Yes, sir.

Q. Which is the maindeck on the *Portmar*? A. When I say the maindeck I mean the weatherdeck—the maindeck is really this one (indicating). I meant the weatherdeck.

Q. All right. Is this the deck that you speak of, this line (indicating on plan)? A. Yes, sir.

Mr. Murphy: I will put a leader and mark that "Maindeck".

Mr. Mount: Do you want to say "Or weatherdeck"?

Mr. Murphy: "Maindeck or weatherdeck".

Q. After the chief officer got those lifeboats lowered to the main or weatherdeck level outboard as you testified, was that before these two bombs were dropped? A. Yes, sir, I believe that was just before the bombs were dropped.

Q. After the chief officer got that done what did you order him to do? A. I ordered him to stand by on the forecastlehead.

944

Q. Did you order him to stand by anything in particular? A. I ordered him to stand by his anchors so we could get our anchor in and so I told him that if we were injured by the bombers I would try to put her ashore before she sank so the troops would have a chance to get off the ship instead of being drowned like rats.

Q. At the time these bombs were dropped where was the chief officer so far as you know? A. On the forecastlehead.

Q. Meanwhile did the troops aboard your ship get those Browning machine guns into action? A. Yes, sir.

Q. Did they man and operate those guns while the attack was going on and while these bombs were dropping? A. Yes, sir.

945

Q. Did they sustain any casualties? A. Yes, sir, they did.

Q. What were they? A. The commanding officer, Major Whitely, he was one of the first casualties. He was severely wounded in the left shoulder and arm.

Q. Were there any casualties among his men? A. Yes, sir.

Q. Did you issue any orders to the military personnel other than those manning the guns? A. Yes, sir, when I saw that Major Whitely was wounded I sent for the next in command, a Captain Jacobs.

946 Q. What order did you give him? A. It took a little time before they got hold of him. When he come up on the bridge I told him to get his men under shelter either on the shelterdeck or in the tween decks.

Q. Did that order include the men that were manning the machine guns? A. No, sir.

Q. Did it mean everybody else? A. It meant everybody that was not fighting the enemy and that was not engaged in operating the ship.

Q. Well, you say operating the ship—were the military
947 personnel operating the ship in any way? A. No, but the crew was on deck.

Q. As to the crew did you issue any orders, your own crew? A. I don't believe I did. They were pretty well under shelter except the carpenter and a man that was standing by on the forecastlehead.

Q. Coming back to your orders to Captain Jacobs then to get the men under shelter, did you mean that he should get under shelter all military personnel not actually engaged in operating the machine guns? A. Yes, sir, that is what I told him.

Q. Where is the shelterdeck of the *Portmar*? A. The
948 shelterdeck, that is a part of the weatherdeck running through the midship houses.

Q. Where is the tweendeck of the *Portmar*? A. That is one deck below the weatherdeck.

Q. Were there any casualties among the seamen on your vessel? A. Yes, sir.

Q. What were they? A. There was an able seaman killed on the boat deck.

Q. What was his name if you remember? A. I believe it was Thomas Tyrell.

Q. Anyone else? A. Several were wounded. There was a fireman I remember, Costello — several others whose names I don't remember, one of them being an ordinary seaman named Freshour and the other one being a deck engineer.

Q. The second bomb that landed in the water alongside the vessel on the port side in the way of the bridge, what effect did that have on the ship as you observed it? A. Either one of the two almost lifted the ship out of the water. I remember the one that fell alongside of the bridge tore the shirt on me and I had a pair of binoculars hung around my neck—the binoculars and my cap completely disappeared. I haven't found the binoculars yet.

Q. What effect did it have on the glasswork on the bridge? A. It completely demolished the bridge.

Q. How about the chartroom? A. Also the chartroom. 950

Q. How about the captain's office? A. My quarters, the doors in my quarters they opened inwards and they were closed but they were blown up and one of them was found on the boat deck.

Q. What effect did it have inside your quarters in your office where you kept your papers? A. All the drawers, all the files and all the lockers, they were blown wide open and everything in them was blown up.

Q. What effect did it have on the radio shack up on the boat deck? A. The radio shack was almost lifted off its foundation, everything in it was demolished, doors torn up, paneling and wainscoting torn up, the radio house lifted up so you could see underneath into the house. 951

Q. Did it have any effect below in the midship accommodations? A. Yes, sir.

Q. What was it? A. The midship accommodations were all completely demolished, everything was torn to pieces, all the lockers were blown up, all the drawers came out of the files and the desks, paneling and ceiling, wainscoting, were torn up and spread all over the quarters.

Q. Do you attribute that effect to the second bomb or to the first bomb or to both? A. After I saw it I didn't know how much had been done by the first or the second. I would say that both of them had some effect on demolishing the houses.

952 *Deposition of Axel Michelson—Direct.*

Q. While this was going on were you trying to pay attention to the position of your ship and to the measures to be taken to get your ship out of danger? A. Yes, sir.

Q. Was there any further attack by the aircraft after those two bombs were dropped? A. Yes, sir, fighters.

Q. Will you now describe the attack by the fighters on the ship after the two bombs were dropped? A. The fighters kept coming in and they seemed to come along our starboard side from aft to forward. We had our lifeboats swung over the side there, they demolished the two lifeboats. We had a bunch of rafts that had been taken aboard for the soldiers—they were over the side, they consisted of gasoline drums enclosed in a sort of framework. They sunk a great number of them, perhaps more than half of them.

953

Q. Did the fighters attack the vessel on the port side with machine gun fire? A. Yes, sir.

Q. And aerial cannon fire? A. Yes, sir.

Q. What effect did that aerial fire have on the starboard lifeboats? A. I cannot say what effect that had on the lifeboats. I saw that the lifeboats were demolished when the fighters came in from aft going to the starboard side of the ship.

954

Q. Did the aerial fire penetrate the lifeboats? A. Yes, sir.

Q. Did the aerial fire have any effect on the rigging of the booms of the vessel, the running rigging of the vessel, the standing rigging? A. It cut the running rigging—three of the booms had their topping lifts cut so they came down.

Q. What did they do when they came down? A. They took along with them everything in the way of them.

Q. Where was the greatest damage of that sort, at what hatch? A. The greatest damage was at No. 4 hatch—No. 4 boom on the port side came down and went through the radio house and tore a ladder off the boat deck.

Q. What effect did the aerial machine gun and cannon fire have on the port side of the ship, the shell plate? A. It tore hole after hole in the shell plate.

Q. In what area? A. That was all from aft until the fireroom on the port side.

Q. In the way of what holds would that be? A. That would be in the way of No. 5 and No. 4 holds, the engine-room and the fireroom.

Q. Looking at the plan, Libellant's Exhibit 2 for identification, will you mark the area, using this red pencil, in which the port side shell plating of the vessel was affected 956
by the aerial machine gun and cannon fire. Use the one that shows it best. A. (Marking plan) This will show it best—that shows in a general way the area affected.

Mr. Murphy: The witness marks with red pencil on plan numbered 3 on Libellant's Exhibit 2 for identification the area so affected.

Q. You have placed these marks on the skin of the ship on the port side running generally from amidships aft. How far above the water line or with relation to the water line where were those holes? A. They were all the way from the weatherdeck and down to the water line, some even 957
below the water line.

Q. How many holes were there? A. A good long time after I had a chance to count them and I counted 91 of them.

Q. What effect did the aerial machine gun and cannon fire have on the decks of the *Portmar*? A. Well, the decks were penetrated both aft and forward and the boat deck in numerous places, steam pipes were penetrated, steam escaping, chains torn to pieces and splinters, smokestack was penetrated, all ventilators were penetrated, the booms all were splintered and marked by machine gun fire with the exception, I believe, of one or maybe two.

Q. One or two what—booms? A. Cargo booms.

Q. How long did this aerial machine gun and cannon attack by the fighters last after the bombs were dropped?

958 A. Say half an hour. They would go away and return when they saw that we were still afloat.

Q. After that aerial machine gun and cannon attack occurred did you receive any report from the chief officer? A. Yes, sir, he told me that there was fire in No. 4 hold in the ammunition.

Q. Did the chief engineer report that any measures had been taken with regard to that fire? A. Yes.

Q. What did he say? A. They were putting the fire pumps on it. He was telling me also that she was starting
959 to take water aft in No. 4 and 5 holds through holes near or below the water line and I told him to put the pumps on and keep her afloat.

Q. Did you give any orders on hearing that your ship was making water in that way? A. Yes, sir, I told the chief mate to get his anchor up.

Q. What was your intention in giving that order? A. My intentions were to beach her if it was possible before she sunk in the middle of the harbor like I had seen other ships do.

Q. Did you order the chief officer to weigh anchor? A. Yes, sir.

960 Q. Was the chief officer able to get the anchor up promptly? A. No, sir, he was not because the steam lines running forward to the windlass, they had been penetrated and opened up by machine gun fire and there was a great loss of steam pressure so it was a slow process of getting his anchor in. He was all alone on the forecastlehead too because the men that had been with him up there, they had sought shelter.

Q. Did the chief officer finally succeed in operating the windlass with what steam he had and getting the anchor aweigh? A. Yes, sir.

Q. Did the chief officer report to you when the anchor was aweigh? A. He signaled to me that the anchor was aweigh.

Q. Did the Japanese aircraft resume their attack? A. Yes, sir, they did.

Q. When the chief officer signaled that the anchor was aweigh did you give any order as to the engineroom telegraph? A. I was on the starboard side of the bridge watching the mate getting his anchor in and the third mate, Mr. Muir, was standing by the engineroom telegraph on the starboard side.

Q. Let me ask a question about those engineroom telegraphs: Where are they located on the *Portmar*? A. They are located on the wings of the bridge, navigating bridge. 962

Q. Are they in the pilothouse? A. No, sir.

Q. Are they out on the open wing of the bridge? A. Yes, sir.

Q. How many were there? A. Two, one on each side.

Q. One on the port wing? A. And one on the starboard.

Q. Where was Mr. Muir standing? A. He was standing by the telegraph on the starboard wing of the bridge.

Q. What order did you give him? A. I said "Full ahead, Mr. Muir".

Q. And what did he do? A. Just then I saw him falling and he says "Captain, they got me" and I saw that they had gotten also the engineroom telegraph.

963

Q. What do you mean by gotten the telegraph? Just express it so that we get it clearly on the record. A. They had demolished it so it could not be used.

Q. By aerial fire? A. Yes, sir.

Q. How far away were you standing when that happened? A. Oh, perhaps four or five feet.

Q. What did you do then? A. I stepped over Mr. Muir and went through the wheelhouse over on the port wing of the bridge to the telegraph over there and put her full ahead myself.

Q. Was the port engineroom telegraph in operating condition? A. Yes, sir.

Q. Did the engines respond to that signal which you gave? A. Yes, sir.

Q. Did the vessel start to move ahead down the harbor? A. Yes, sir, she did.

Q. Did you give any order to the chief officer at that time? A. I did not give him any orders because there was such a noise and racket that you couldn't hear anything. I motioned to him to come from the forecastlehead up on the bridge.

Q. When he got there what did you tell him to do? A. I told him, I said "Mr. Bullock, you better go up on the compass bridge and give us the courses down the harbor
965 here" because the charts had all been blown away and I had made up my mind that I was going to run down the Middle Arm of the harbor. I saw there was a nice beach down close to what I thought was an Australian military camp.

Q. Now, Captain, looking at this chart, is the Middle Arm indicated on the chart? A. (Referring to chart) Yes, sir.

Q. Will you point it out? A. Yes, sir, this is the Middle Arm, this is the East Arm (indicating).

Mr. Murphy: The captain indicates two arms shown on the chart. One is labeled "Middle Arm"
966 and the other "East Arm".

Q. Is the Middle Arm labeled on the chart the area you intended to pass through? A. Yes, sir, I could see the camp on the Channel Island and I thought that was a military camp (indicating).

Mr. Murphy: The captain points to a camp labeled on the chart "Leper Station".

Q. Is that the camp you thought was the military camp by eyesight of the actual terrain there? A. Yes, sir.

Q. Was that the island you intended to navigate toward? A. Yes, sir.

Q. Is that the island marked "Channel Island" on this chart? A. Yes, sir.

Q. Did the mate go up on the flying bridge? A. Yes, sir.

Q. Is that where the standard compass was? A. Yes, sir.

Q. Did the mate make any report to you after he got up on the flying bridge? A. He said "Captain, the standard compass is gone".

Q. What did you do? A. I jumped up to the compass bridge. 968

Q. By compass bridge do you mean the bridge above the navigating bridge? A. I mean the deck above the wheelhouse and the navigating bridge.

Q. Is that the top bridge of the ship? A. That is the top bridge on our ship, or was, yes.

Q. Looking at Libellant's Exhibit 2 will you point out the top bridge or the compass bridge which you have mentioned? A. (Indicating) That is this one here.

Mr. Murphy: The captain draws an arrow to the bridge above the words Chart and wheelhouse" which I will mark "Compass bridge".

969

Q. That compass bridge is the highest bridge on the ship above the water line? A. Yes, sir.

Q. When you got up to the compass bridge what did you find with respect to the standard compass? A. I found that what the mate said was true.

Q. Well, what did you find? A. I found that it had been completely demolished, blown to pieces by machine gun fire.

Q. What did you do then? A. I jumped down on the navigating bridge again, was going to give the helmsman the course from the steering compass in the wheelhouse.

Q. Will you indicate the navigating bridge on Libellant's Exhibit 2?

(Witness indicates.)

970 Mr. Murphy: The captain draws an arrow which I will mark "Navigating bridge".

Q. When you got to the navigating bridge what did you find? A. I found that the steering compass had gone while I was on the top bridge—I found that that had been blasted out of its gimbals.

Q. You say that occurred in the interval while you were up on the flying bridge? A. Yes, sir.

Q. So far as you know was the navigating compass in
971 serviceable condition when you ran up to the compass bridge? A. I am fairly certain it was.

Q. When you came down you found it knocked out of its gimbals? A. Yes, sir. I found also that I could see out through the roof of the wheelhouse in the port side, the forward port corner. The man at the wheel was still there and I asked him if the steering gear was all right and he said "Yes, but this is getting to be damn nasty, Captain".

Q. How did you direct the wheelsman how to steer from that point on? A. Well, there was no more windows in the wheelhouse so we could see out ahead from the wheelhouse and I told him to steer for a certain point what I thought would give me the best water running down the Middle
972 Arm, which he did.

Q. What orders did you give the chief officer at that point? A. I told the chief mate that as soon as we got down close to that camp down there I would anchor and get the men off the ship.

Q. Did you give the chief officer any instructions as to where to go and what to do while you were running down the harbor? A. I don't remember that I did.

Q. Did you give any orders with respect to heaving of the lead? A. Yes.

Q. Whom did you give that order to? A. I gave that order to the chief mate. I said "When we get down towards that anchorage down there you better stand by with your hand lead so we can get in just as far as she will float".

Q. Was it your intention at that time to beach the ship or to find an anchorage? A. Well, I had both things in mind. I wanted to get the soldiers off the ship first because I saw what was happening all around.

Q. Was there any further difficulty with fire on the vessel? A. Yes, sir, once more it was reported to me that there was fire in No. 4 hold and I told the mate to go and see about it.

Q. Did he later report to you about that fire? A. Yes, he came back and told me that it was military equipment, I believe tents, and he said that they had the fire under 974
control.

Q. Did you receive any other report at that time about the extent to which the ship was making water? A. A soldier and later on I believe the second mate came and told me she was making quite a bit of water in No. 4 and 5 holds.

Q. Were you proceeding at full speed ahead down the Middle Arm at that time? A. No, sir, after we got her well under way it seemed that the attacks from the planes eased up some and I slowed her down because we were dragging a bunch of those rafts after us and if we had kept on full speed we would have broken them all adrift and I wanted to have them alongside so that the soldiers could 975
use them in case of having to get away from the ship in a hurry.

Q. Was anyone on those rafts at that time? A. Yes, sir, there were several men in the rafts. There was also men in the two lifeboats on the starboard side—they were in the water by that time, I don't know whether they were shot down or fallen down.

Q. How were they lying in the water, the lifeboats? A. They were just about awash. It struck me they were kept afloat merely by the tanks—there are air tanks in all lifeboats, there was before the war.

Q. By that are we to understand that some of the tanks had remained intact enough to keep the lifeboats afloat just a while? A. Yes, sir, they must have.

976 *Deposition of Axel Michelson—Direct.*

Q. You were proceeding then at slow ahead so as not to swamp these rafts you were towing? A. Yes, sir.

Q. Was there anyone in the lifeboats? A. Yes, sir, there was members of the crew and a number of soldiers.

Q. Did the Japanese aircraft return to another attack on the harbor after that point? A. Yes, sir, while going down the Middle Arm there was another squadron of Japanese planes came in from just about the same quarter as they came in in the morning.

Q. By that do you mean from the southwest? A. Just
977 about from southwest.

Q. Did they attack the *Portmar* as she was going down the harbor? A. No, sir, they did not attack any ship in the harbor. They went over the harbor and they went in over town and seemed to be going down towards the military camps that were situated south or south southeast of Darwin some distance out of town.

Q. As you proceeded down the harbor did any vessel lend you any assistance? A. There was an Australian corvette, the *Vigilante,* came alongside and asked if she could be of any assistance.

Q. What reply did you make to that offer? A. I told
978 him the fix I was in, I had no compasses and no charts and I told him to lead the way down the Middle Arm to a safe anchorage.

Q. Did the *Vigilante* comply with your request? A. Yes, sir.

Q. Did she steam ahead? A. She steamed ahead and we followed.

Q. Did the lifeboats which you were towing remain in tow of your vessel all the way down? A. No, sir, I believe the crew cut them loose, I can't say for certain, I wasn't looking much astern, I was looking ahead.

Q. Did the *Portmar* eventually get down opposite the point which is marked on the chart as the Leper Colony on Channel Island? A. Yes, sir.

Q. What did you do then? A. I anchored.

Q. Have you the bearings of that point of anchorage? A. Yes, sir.

Q. Will you read the bearings off? A. Yes, sir. (Reading) The position I anchored in was 12, 33½ south.

Q. And what was your longitude? A. 130 degrees 51.2 minutes east.

Q. Will you plot that anchored position on the chart?

(Witness does as requested.)

Q. Have you plotted on that chart the position at which the *Portmar* was anchored off Channel Island? A. Yes, sir. 980

Q. Can you give us the approximate time at which that anchor was dropped? A. Not unless I can take a look in the logbook.

Q. By all means do—that is February 19th. A. (Referring to logbook) 1.05.

Q. 1.05 P. M.? A. That's right.

Mr. Murphy: I will ink over the lines which you have drawn, the intersection of the pencil lines, and I will put a legend "*Portmar* anchored 1.05 P. M. 2/19/42".

Q. What orders did you then give with regard to the troops on board your ship? A. I told the chief mate to put overboard a launch that we carried for the American Army that we were going to take with us to Koepang. 981

Q. What was the name of that launch? A. *Nevbet.*

Q. Was that launch put on board the *Portmar* before you started out across the Timor Sea in the convoy? A. Yes, sir.

Q. Did the chief officer succeed in getting that launch lowered away? A. Yes, sir.

Q. What boom did you use for that? A. We used the heavy thirty-ton boom at No. 2.

Q. What did the *Vigilante* do after that? A. The *Vigilante* went away—I cannot tell you where.

982 Q. Did you then start to disembark the military personnel from the *Portmar*? A. Yes, sir.

Q. How many trips did the *Nevbet* make from the *Portmar* to shore?

Mr. Collins: I don't want to interrupt but I object to this as wholly immaterial and having no bearing on the issues at all. It seems to me it is just a waste of time to go into how many trips this launch made with troops. If it has any materiality I will withdraw my objection but I don't see it.

983 Q. How many trips did she make from the *Portmar* to Channel Island? A. Two.

Q. How many soldiers did you disembark? A. Say fifty, sixty.

Q. Did the *Vigilante* ever come back again? A. It seems to me a small Australian corvette came alongside and picked up a number of soldiers.

Q. Did all the American soldiers get ashore from the *Portmar* while you were there at anchor? A. Yes, sir.

Q. In one craft or another? A. Yes, sir.

Q. While the soldiers were being disembarked did the
984 chief officer make any report to you about the condition of the vessel? A. He told me that the ship was making so much water that it was doubtful whether we would be able to keep her afloat.

Q. Did the chief engineer report to you as to operation of the pumps? A. Yes, sir.

Q. What did he report? A. He told me that his pumps were all right but his bilge lines were either busted or broken or perforated and full of scale and dirt and that he was not making any headway on the water in No. 4 and 5. I believe that he finally opened up No. 4 and 5 and let the water into his engineroom bilge.

Q. Did the chief engineer report what that scale and dirt was that was clogging the bilge lines? A. That was

all stuff that had been dislocated during the bombardment and heavy bombing.

Q. Did the chief engineer report what measures he was taking to try and get the water out of No. 4 and 5 holds without using the 4 and 5 bilge lines? A. Yes, he told me that he was letting it into the engineroom bilge and putting the main circulating pump on it.

Q. Did the entry of that water in the ship have any effect on the trim of the vessel? A. Yes, sir, it did, she took a port list more and more so. As she took more and more of a port list more and more of the holes got below the 986 water line.

Q. By holes you mean (spelling) h-o-l-e-s? A. Yes, I mean the holes caused by the cannon and machine gun fire along the port side.

Q. Did that increase the rate at which the water was entering the ship? A. Yes, sir.

Q. Did you give any orders in view of the list the vessel was taking? A. Yes, I told the mate that I would run her ashore if possible down south of Channel Island because we would be unable to keep her afloat and I thought she would be in a pretty sheltered position down there.

Q. Did the mate get the anchor aweigh again? A. Yes, 987 sir, he had merely lowered it over the side, there was no chain up on her.

Q. Did you order the mate to get the anchor aweigh? A. Yes, sir, I told him "If you can't get it aweigh I will burst it out".

Q. After the anchor was aweigh in what direction did you proceed? A. Down the Middle Arm again.

Q. In what direction? A. South by east, maybe south southeast.

Q. What were you making for? A. I was making for a cove or a place that I could see from where we had anchored and that looked like a pretty nice place.

Q. Will you indicate that cove on the chart? A. It is this place here (indicating on chart).

Q. Suppose you draw a large circle to show the general area that you wanted to get into?

(Witness does as requested.)

Mr. Murphy: The witness draws a circle on the chart indicating the area he wished to reach.

Q. How did you navigate down the Arm from that anchorage toward that area without any compasses? A. Well, I wasn't much concerned about the course. I was only concerned about the depth of water. I tried to tell
989 by the color of the water where I would find water that would keep the ship afloat.

Q. Did you order the chief officer to assist you in observing the color of the water? A. Yes, the chief mate was helping me.

Q. Did you pick your way among the reefs in that way? A. Yes, sir. I didn't get her in quite as far as I thought I would because there was a knoll on the starboard side that I missed and I ran her up on it.

Q. By knoll do you mean a shoal? A. Yes.

Q. A hump in the bottom? A. A hump in the bottom, yes, that is a better name for it.

990 Q. Was that the point where you actually ran her aground? A. Yes, sir.

Q. On what side of the ship did she strike? A. On the starboard side.

Q. In what area of the vessel? A. From about amidships to aft.

Q. What kind of a bottom? A. I later on did quite a bit of sounding. It seems to me that it was stiff clay.

Q. In what depth of water did she take ground? A. Say about twelve feet.

Q. And what was the draft of the vessel when last observed when you were, say, at anchor up near Port Darwin on the morning of February 19, 1942? You may look at the log or your notes. A. (Referring to log) The last draft that is down in the logbook is under February 14th

when we left Darwin for Timor. It says 11.4 forward and 13.10 aft, making a mean of 13.01—no, I beg your pardon, this was in the morning—later on in the evening the draft sailing it says 11.4 and 15.2, making the mean of 13.3.

Q. In between that observation of draft and the time you took ground was any of the cargo on board the ship taken out of the ship? A. No, the only thing that was taken out of the ship was—I find here again arriving in Darwin, that was the 18th.

Q. What was the draft then? A. 11.2, 14.8.

Q. 11.2 forward and 14.8 aft—the mean? A. Mean 992
12.11.

Q. Does that draft substantially represent the draft of the ship at the time she took ground? A. Very near, may have been an inch or two less.

Q. At what time did the vessel run aground as you have described? A. The vessel grounded at 2:12.

Q. P. M.? A. P. M., south of Channel Island.

Q. On February 19, 1942? A. That's right.

Q. Have you any bearings of that stranded position? A. Yes, sir.

Q. Will you please say what they are and then plot them on the chart? A. (Referring to log) It says here the 993
place where ship finally rested was in 12 degrees 34 minutes south latitude, 130 degrees 52 minutes east longitude.

Q. Will you plot those on the chart? A. It says "very nearly" and I notice by looking at this chart here that it is a little different from what I had in Darwin, I notice a difference in the shape of the cove.

Q. Well, using that chart will you just plot those bearings on the chart? A. Yes. (Plotting chart) That is the way it comes out. I was a little further west—about there, I would say (indicating).

Q. Well, that is close enough.

Mr. Murphy: I will ink over the intersecting lines you have drawn and place a legend "*Portmar* stranded 2:12 P. M. 2/19/42".

994 Mr. Collins: I would like to note an objection to the use of the term "stranded".

Q. Are these bearings you have plotted on this chart intended by you to be exact? A. No, sir. I had no compasses left on the ship.

Q. How did you get those bearings? A. Those bearings I got from an Australian corvette that a day or two afterwards got alongside of the ship and I went up and took them from her gyro compass on her bridge.

995 Q. Was she lying alongside of the *Portmar* then? A. Yes.

Q. Had the *Portmar* changed position in any respect between the time she first beached and the time you took those bearings? A. Yes, sir.

Q. About how far? A. I couldn't say for certain but on the 19th when the crew left the ship, before the crew left I let go the port anchor. I stood by the ship for two days. About half the time I was in the launch *Nevbet* and I found on the first high water that she had straightened up some on the loose chain that was hanging down over the port anchor.

996 Q. About how far would she have shifted, as an estimate? A. Oh, possibly a few hundred feet.

Q. Are we to understand that you yourself took these bearings by the gyro compass or the pelorus? A. On the Australian corvette.

Q. On the Australian corvette lying alongside? A. Yes, sir.

Q. On what date? A. I am not too certain. I believe it was the following day, either the 20th or the 21st.

Mr. Murphy: I offer this chart for identification as Libellant's Exhibit 4.

It is so marked.

Q. After the ship was beached did you make any effort to do anything about the holes that were in the port side

shell plating as you have described as a result of the aerial fire? A. Yes, sir, I told the mate to go down to see what he could do about it and told him to plug as many of them as possible and try to keep the ship afloat.

Q. How was the ship lying there at that moment after you beached the ship? A. She was lying with a heavy port list, the list becoming more and more of a list because at that time the water had started to run out of the harbor—it was an ebb tide.

Q. Was she aground under her port side aft? A. She was aground on the starboard side aft. 998

Q. Are we to understand that she was resting on the starboard side aft and listing over to port? A. That's right.

Q. Was she aground forward? A. No, sir, I don't believe it.

Q. Did the list of the ship remain constant? A. No, it increased all the time as the water ebbed out of the harbor.

Q. What effect did the increase of the list of the ship have upon the work of plugging the holes in the port side along the water line? A. The mate had his men over the side and some of those rafts I have described that were given us for the soldiers, as it took more and more of a list she was hanging up over the rafts and more and more of the 999 holes would go below water. It became more and more difficult to do work there, more and more water ran into the ship as more and more holes would get below the water line.

Q. Was any effort made to control the height of the water in the vessel by means of the bilge pumps? A. Yes, sir.

Q. Was the engineroom bilge pump kept going? A. Yes, sir.

Q. Did it succeed in keeping down the increase in the height of the water in the ship? A. No, sir, it did not. It did for a while but only for a while. The chief told me that it was gaining.

Q. Did you give any orders with respect to the refrigerator plant on the ship? A. Yes.

Q. What was that? A. The pipe in the refrigerator plant had been penetrated by machine gun fire and let up ammonia fumes that penetrated the whole ship. I asked the chief to see what he could do about it and I know that he made a determined effort to stop the leaks but did not succeed because it was too dangerous.

Q. Did the chief engineer make any report to you later that afternoon about whether he could succeed in keeping
1001 down the water level in the vessel? A. He told me he could not.

Q. About what time did he report that to you? A. I believe that was between 4 and 5 o'clock.

Mr. Collins: Still on February 19th?

The Witness: This is all February 19th.

Q. How many degrees was the ship listing to port by the time the chief engineer made that report to you? A. Oh, the list was getting to be dangerous, you couldn't retain a foothold anywhere.

Q. How many degrees to port? A. Say about 40, a few
1002 more or less, maybe.

Q. Did the chief make any report to you about any effect on the boilers if the list increased any more? A. He says "Captain, if this list is going to increase any more I cannot guarantee that the boilers are not going to blow up".

Q. Did you make any decision after receiving that report from the chief engineer? A. Yes, I told the chief engineer to as much as he could and as near as he knew how secure everything in the engineroom and get his men out of the engineroom. I told the mate that I was going to take the crew off the ship before she was going to turn over because I was afraid she was going to turn over. Just about that time the Australian corvette *Vigilante* came alongside again and he says "Captain, if you will send your men down on

me now I will take them off but unless you do it now I won't dare to stay alongside of you because your ship is going to turn over".

Mr. Collins: I move to strike out the last part of the answer as to any testimony as to what the mate of the *Vigilante* said.

Q. Did you order your crew to leave the vessel in view of the danger of the ship's capsizing? A. Yes, sir. I was also afraid of the boilers blowing up.

Q. Did you issue any orders to the chief officer? A. I 1004
told the chief officer to check off all the men and see how many he had and see that everybody that was aboard the ship got off.

Q. Did you do anything with regard to the anchor before the men left the vessel? A. Yes, sir.

Q. What did you do? A. I went up and let go the port anchor myself. I believe the chief mate was with me.

Q. What was the purpose of dropping that port anchor? A. Well, I knew that there was very high tides in Darwin Harbor and I thought that if the night-tide should come in and find the ship just aground and not anchored it might move the ship and put her in a worse place than she was in. 1005

Q. Did the deck and engineroom crew go away then on the *Vigilante*? A. Yes, sir.

Q. Did the chief officer and chief engineer go with them? A. I gave them instructions—

Q. Answer the question. A. Yes, sir.

Q. Did you give the chief officer and chief engineer any instructions as they went aboard the Vigilante? A. Yes, sir.

Q. What did you order them? A. I told them to keep the crew together, get in to Darwin and if possible get in touch with the American military authorities and see that the crew were taken care of.

Q. What did you do then? A. I went in the launch *Nevbet*.

1006 Q. Was anyone with you? A. Three men of the crew—I asked them to stay by me in the launch and they did so.

Q. What did the launch *Nevbet* do after you got on board? A. Well, the men, they were afraid the ship was going to turn over and we stayed a little off the ship for a while. The men they were mostly watching for Japanese airplanes.

Q. Was there any further aerial attack by the Japanese in the harbor of Port Darwin during the afternoon of February 19, 1942 while you were beaching the ship and
1007 while you were trying to plug the holes? A. Not that I know of or remember.

Q. How long did you remain in the *Nevbet* alongside the *Portmar* after going aboard on the early evening of February 19, 1942? A. After dark she started to straighten up some and I told the men I wanted to be put aboard ship. We went alongside of the ship and with the exception of one we all went aboard the ship.

Q. You said the ship was starting to straighten up some. What caused that? A. The incoming tide.

Q. When you went on board the ship what list did the ship have? A. Well, she had a lot less then than she had
1008 when we left her and decreasing all the time while we were aboard ship.

Q. With the rise of the tide? A. With the rise of the tide, yes, sir.

Q. Just for the record, Captain, did the vessel ever capsize? A. No, sir.

Q. How long did you remain on the ship after you went aboard her from the launch *Nevbet* that evening? A. We were aboard practically all night. I wanted to stay aboard the ship but when daylight came the men would not stay aboard the ship.

Q. Was that because of fear of further Japanese attack? A. Yes, sir.

Q. What did you do then? A. Well, there was no water on board ship and there was nothing to eat so I went with them in the launch.

Q. Was there any steam? A. No, sir.

Q. Was there any electricity? A. No, sir.

Q. Was there any domestic or sanitary water? A. No, sir.

Q. What did you do? A. I went in the launch with the men and we went in under the mangroves a little to the south of the Channel Island for a while.

Q. This was on February 20, 1942? A. Yes, sir.

Q. And then what did you do? A. While we laid there watching developments in the harbor we saw Japanese planes coming in over the town and to the south we heard 1010
some bombing, I don't know where it was.

Q. Did you return to the *Portmar*? A. We returned to the ship several times during the day. Some of the men thought that——

Q. Well now, wait a minute, Captain, you are not permitted to testify to what some of the men thought. That is just a principle of law—so we will just stick to what you did. What did you do on board the vessel on February 20th when you went on board? A. I mostly observed the condition of the vessel.

Q. Did you stay on board the vessel on the night of February 20th to 21st? A. Yes, sir.

Q. Did you stay on board the vessel all night? A. Yes, 1011
sir.

Q. Were you on board the vessel on February 21st during daylight hours? A. Yes, sir.

Q. Did you remain on board the vessel on the night of February 21st to February 22nd? A. No, sir.

Q. What time did you leave the vessel? A. It must have been in the late afternoon of the 21st.

Q. At about what time? A. Oh, possibly four or five o'clock, I can't be certain.

Q. How did you leave the vessel? A. We left in the launch because we had no more water to drink and we had to get into the islands to get water to drink.

Q. Before you left the vessel what did you do? A. I went to let go of the starboard anchor also.

Q. As you left the vessel what was the position of her anchors? A. Well, the port anchor was leading ahead.

Q. About how far? A. I can't be certain, I don't know.

Q. Where was the starboard anchor? A. The starboard anchor was hanging at the bow and I let it go.

Q. And how did it drop? A. Straight down—I let it take all the cable it would which meant that a lot more run out than the depth of water.

1013 Q. Why did you drop the starboard anchor? A. Because I was worrying about getting in contact with people that could help me take care of the ship and try to notify my owners back in the States of what had happened. Also I had to take care of the crew and see that they were taken care of. I knew that during that period of the year sometimes a very heavy cyclone could walk across the northern territories of Australia.

Q. Was it that you wanted to hold the ship in position? A. Well, I thought that it would be added security that the ship would not run away from where she was.

Q. Did she have any list at the time you left her on February 21st? A. Yes, sir.

1014 Q. About how much? A. Say 10 degrees. I left her on the 21st but I came back again on the 21st, the same evening.

Q. Well, now, will you tell us where you went between the time you dropped the starboard anchor and went in the launch—where did you go and what did you do? A. We went into Channel Island or just south of Channel Island. We had found a little spring where there was fairly good fresh water. We went in there to fill our cans. We saw a launch coming down the harbor and after we had gotten the water we waited until the launch came down. I had my binoculars with me in the launch and I thought it was the chief mate that I could see standing up in the launch.

Q. What were those binoculars that you just mentioned? Was that the pair that was blown off you in the bombing

of February 19th? A. No, sir, the pair that was blown off me was ship's binoculars. Those I am talking about were my own personal binoculars—I have got them yet.

Q. Well, go ahead, tell us what you did. A. I could see it was the chief mate so we went up from the beach to meet them a little and waved to them and the mate, he recognized the launch that he had handled a couple of days before and he came in and he had with him in the launch a Colonel Petterson and another gentleman whose name I later found out was Williams, an Australian.

Q. So that we can identify this Mr. Williams, is he the 1016
same Mr. Williams that later brought suit against the vessel for salvage, in company with others? A. The very same.

Q. Now, when that launch came along with Mr. Williams and Colonel Petterson what did you do? A. I did go in their launch because the mate told me that they had taken him along out to the ship—Colonel Petterson had—because Colonel Petterson was the commanding officer of the 148th Field Artillery and all his 75s were aboard the ship and he wanted to see if they could be salvaged and taken out of the ship.

Q. Did you go back to the *Portmar* with Colonel Petterson and Mr. Williams in their launch? A. Yes, sir.

Q. Will you describe what occurred in that conversation 1017
on board the *Portmar*? A. Well, we went aboard the *Portmar* and Colonel Petterson was anxious to find out all about his guns, where they were located in the ship and what we thought of the possibilities of salvaging them.

Q. Salvaging the guns? A. Yes, sir.

Q. Did Colonel Petterson and Mr. Williams make an investigation of the disposition of the cargo in the ship? A. Well, they did as much as was possible to do. The mate and myself, we explained to them as near as we could where the guns were located, how we thought they could be gotten out.

Q. Was anything said at that conversation between Mr. Williams, Colonel Petterson and yourself aboard the ship about salvaging the *Portmar* herself? A. No, sir.

Q. What was the condition of the vessel at that time with regard to water level and with relation to her decks? A. Well, at low water she would be submerged from the aft end of the ship to the aft end of the midship house.

Q. And how about at high water? A. At high water the water would be over the poop and run into the shelterdeck.

Q. After this conversation on board the *Portmar* what did you do? A. I went ashore with the Colonel in his launch.

Q. Did Mr. Williams go ashore with you? A. No, sir, I don't believe he did.

1019 Q. Is it your recollection that he remained at the vessel? A. Yes, sir, it seems to me that he knew that one of the little Australian corvettes would later on be down to the ship and I believe he planned them taking over, I don't know, I am not quite certain of this.

Q. This is about what time on the night of February 21, 1942? A. This would be towards dusk.

Q. After that did you go to Port Darwin with Colonel Petterson in his launch? A. Yes.

Q. When you got there what did you do? A. I went down to the American camp about twenty miles south of Darwin and reported to the American commanding officer.

1020 Q. Before going to that camp did you make any effort to find any officials in Darwin? A. Yes, sir.

Q. What did you do in that regard? A. One of the first things I did when I went ashore, I had all the ship's secret documents along with me and I brought them down to the Australian Naval Control and turned them in and got a receipt for them.

Q. What do you mean by the secret documents? Don't tell us what was in them but tell us what they were. A. They were code books, for instance.

Q. You rescued those from the ship? A. Yes, sir.

Q. Is this the receipt which you received from the Australian Naval Control officer (handing same to witness)? A. Yes, sir, that is the one.

Mr. Murphy: This receipt is dated M/V *Portmar* at Port Darwin February 21, 1942. I offer a photostat of the original and ask that it be marked as Libellant's Exhibit 5 for identification.

It is so marked.

Mr. Mount: Are you going to ask him what these abbreviations mean?

Mr. Murphy: No.

Q. Are you able to tell us the meaning of these entries made in the left-hand column of this receipt? Can you 1022
tell us what the meaning of those notations is? A. They are all code books or de-code books and directives. There is one "S P"—a certain number—I forget what that was.

Q. Were those documents which you originally received from the United States Navy? A. Some of them, not all of them. Some of them I had received from the Australian naval authorities after arriving in Australia.

Q. And some of them you did receive from the United States Navy? A. Yes, sir. This "S P" was one I had received from the Navy. I happen to remember what it was.

Mr. Mount: Were any of those that you received 1023
from the United States Navy received on leaving San Francisco or were they received afterwards?

The Witness: They were received on leaving San Francisco.

Mr. Mount: Looking at this Exhibit 5 for Identification, could you point out the ones that you had on board when you left San Francisco?

The Witness: I believe those mentioned in the last three lines. I cannot be quite certain about that. Two of them I had. About the third one I am not quite certain.

Mr. Mount: And the first three were received by you when?

The Witness: They were British publications by the British Admiralty.

Mr. Collins: Did all the books relate to the navigation of the vessel while at sea?

The Witness: They practically all of them related to communications with other ships and naval authorities, British and American.

Q. Now, Captain, while you were in Darwin after you turned these documents in and got this receipt did you
1025 make any effort to find any notary in order to note a protest? A. I remember I asked the man that signed the receipt for me, I remember he was a merchant man like myself that was in the Australian Naval Reserve, and I told him the fix I was in and I told him that I would have to get in contact with a public official somewhere as soon as possible and he said, "Captain, I am afraid you are plumb out of luck".

Q. Wait a minute, I don't think you can say what that gentleman said to you, but I will ask you the question: Did you make any effort to find any official before whom you could note a protest? A. Yes, sir.

Q. And did you succeed in finding one? A. No, sir.

1026 Q. Was there any public official of any kind in Port Darwin that night when you got there? A. I doubt it.

Q. Were you able to find one? A. No, sir.

Q. Then did you go out to the military camp? A. Yes, sir.

Q. How did you get there? A. I was given transportation from Darwin on application to a military post of the Americans in Darwin.

Q. What kind of transportation did you get out to the camp? A. A military truck.

Q. How far out was the camp? A. I don't know—say twenty miles, twenty-five maybe.

Q. Did you find your crew at the camp? A. Yes, sir.

Q. Did you try to send a cable message to your owners at that time? A. Yes, sir.

Q. Whom did you speak to about that? A. The commanding officer, Colonel LaRue, I reported to him the same evening.

Mr. Collins: Commanding officer of what?

The Witness: Of the American troops in the American territory.

Q. Did Colonel LaRue say you could send your cable to your owners? A. No, sir, he did not give me any hope 1028
at all.

Q. Were you able to send a cable to your owners? A. No, sir.

Q. Did you re-visit the *Portmar* after that? A. Yes, sir.

Q. When? A. I believe the day afterwards I went back to it.

Q. Did you remain at the camp that night of the 21st? A. Yes, sir.

Q. Did you need any rest by that time? A. I needed it, I didn't get it though because there was too much to do. They told me out in the camp that they were short of everything, that the taking care of my crew was a burden 1029
on them, and I had with the few men that stood by me in the launch out there saved a lot of provisions, that is I had brought it up from where the water might get at it to places where I thought it might be safe until I could get it out of the ship, so I got hold of Mr. Bullock.

Q. Who is Mr. Bullock? A. The chief mate—and I told him I thought the proper thing for us to do was to get as much of the provisions off the *Portmar* down to the camp as possible because we did not want to burden anyone.

Q. When did you carry out that idea? A. I believe I started out the following morning.

Mr. Collins: On the 22nd?

Q. Was that on February 22nd? A. I believe so.

Q. Were you back to the vessel on the 22nd? A. Yes, sir.

Q. How long did you remain on board? A. I am not quite certain. It seems to me that I stayed aboard that night and sent the launch ashore loaded down with provisions. I am not quite certain though.

Q. In any event, were you on board the vessel on February 23rd? A. Yes, sir, we loaded more provisions.

Q. Did you remain on board the vessel on the night
1031 of February 23rd and 24th? A. I believe I did.

Q. While you were at the vessel did you observe any more Japanese attacks on the harbor or the shipping or the town? A. I saw Japanese planes coming in practically every day I was in Darwin. I saw them drop a bomb here and there in the harbor if they thought there was any activity going on. They never dropped any bombs in the vicinity of the *Portmar*.

Q. Had there been any change in the position of the ship up to the morning of the 24th of February? A. She seemed to have settled a little more by the stern and she seemed to have straightened up a little bit more.

Q. What was the effect of the rise of the tide on the
1032 bow of the ship as the tide came in? A. The effect was that the stern would stay down whereas on incoming tide the forward end of the ship would rise with the tide.

Q. What was the effect of that on her structure? A. I would say it was a very severe strain.

Q. How many times each day did that occur? A. That tide comes in and goes out twice a day.

Q. On February 24, 1942 after you had gotten the provisions which you required at the camp what did you do? A. I went down to the camp and I found out then that there was a small American ship there, the *Admiral Halstead*, had come in to Darwin Harbor loaded with gasoline and that the Army was short of gasoline and wanted to get it off the ship in the worst way.

Q. What else did they say they were short of? A. Well, they were short of lots of things, they were short of ammunition.

Q. Well, they wanted to get the gasoline off the *Admiral Halstead*? A. Yes.

Q. Was anything done with regard to your crew in that respect? A. Well, I went and saw the men about it and I said "I think we better go and give the soldiers a hand because they are in a bad fix. We all expect the Japanese to come in most any day and" I said "I don't think we can afford to lay around here loafing, we better go to 1034
work and see what we can do so they cannot accuse us of eating the provisions, we have to do something".

Q. Speaking of that Japanese invasion, what did you observe with reference to preparations for the Japanese invasion in the Port Darwin area? A. I saw practically all there was to see. I don't know if I am at liberty——

Q. I think you are because this is an impounded suit and you can speak freely as to what you saw? A. Well, I saw and I knew that all the troops in the northern territory around Darwin were ready to leave at short notice. From what I heard and saw they were ill-equipped, they were absolutely green troops without any fighting experience, 1035
they had very little in the line of supplies and equipment, they were short of ammunition for their guns. A general commanding one of the American regiments, he told me, he said "Every vehicle in my outfit is turned south and ready to go the minute the Japs come".

Q. Did you see any structures erected or barricades or anything of that nature ready to repel a Japanese invasion? A. No, there was nothing.

Q. Did your crew do anything and did you do anything to assist the Army to discharge the gasoline from the *Admiral Halstead*? A. Yes, sir.

Q. Where was the *Admiral Halstead* where you did this work? A. She was in Darwin Harbor.

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Q. Was she at anchor or at the jetty? A. She was at anchor in the daytime. The crew would leave her in the daytime.

Q. Why did they leave her in the daytime? A. For fear of the Japanese blowing her up.

Q. And when did they do the work? A. After dark they would go to work, take her in alongside the wharf and discharge as much as they could so they could have her put at anchor when daylight came again.

Q. Were you there with your crew while that work

1037 was being done? A. Yes, sir.

Q. Did you return to the *Portmar* at any time prior to the 2nd of March while this work was being done on the *Admiral Halstead*? A. Yes, sir, I did. I don't remember the dates though.

Q. How many times did you go back to the ship up to the 2nd of March, that is between the 24th of February and the 2nd of March? A. I can't say for certain, two or three times, it may have been four.

Q. Did you examine the ship on each occasion while you were there? A. Yes, sir.

Q. Did you see Mr. Williams around the ship when you went back there? A. Yes, sir.

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Q. What was he doing? A. He was making preparations and later on taking up the 75s of Colonel Petterson of the 148th Field Artillery.

Q. Did you see Captain Williams—I mean Mr. Williams—do anything— A. It doesn't make any difference, he was a master mariner.

Q. Did you see Captain Williams taking any steps with regard to releasing the vessel herself from the beach or to pumping the water out of her and floating her again? A. No, sir, nothing whatever.

Q. Was there any watchman in charge of the *Portmar* while you were away with your crew working on the *Admiral Halstead*? A. No, sir, none.

Q. Was there any available? A. No, sir.

Q. Was the position of the ship any worse when you got back to her during the interval of February 24th to March 2nd than it was when you left her on the night of February 24th? A. Just about the same, it had not either worsened or bettered very much.

Q. Did you return to the *Portmar* on March 2nd? A. Yes, sir.

Q. What occurred on that occasion, how did you find the ship? A. The same as on previous occasions only it seemed to me that she settled more and more by the stern.

Q. At high water, what was the level of the water on 1040
the after deck? A. At high water the water was way over the poop aft and it covered the whole ship up to the midship house and run all the way up to the forward end of the shelterdeck in the midship house.

Q. What was the list, if any? A. Say 10, 11 degrees.

Q. In what direction? A. To port.

Q. Did you visit the *Portmar* again after March 2nd? A. I visited her on March 3rd, I am fairly certain of that date—I am fairly certain of the 2nd and 3rd both.

Q. What did you find on March 3rd? A. The very same conditions prevailed.

Q. When you went to the vessel on March 3rd how long 1041
did you remain on board? A. I was there a considerable time, I cannot say exactly how long.

Q. Did you remain on board on the night of March 3rd and 4th? A. No, sir.

Q. Did you go back to the camp of the 147th Field Artillery that night? A. Yes, sir.

Q. Captain, it was the camp of the 147th Field Artillery, you say? A. Yes, sir.

Q. But the troops that you took on board for the trip across the Timor Sea was the 148th Field Artillery? A. That's right.

Q. Then there were two United States Field Artillery regiments in Port Darwin? A. Yes, sir.

1042 Q. Thus the camp where your crew were quartered and where you were going from time to time was the camp of a different regiment from the regiment of troops some of which you carried on board the *Portmar* across the Timor Sea and back? A. Yes sir, the 148th that we attempted to carry to Timor, they lost all their supplies and stores aboard the *Portmar.*

Q. When you say they lost all their supplies and stores do you mean they lost their guns also? A. Yes sir, their field guns.

1043 Q. Are we to understand that they lost those field guns? A. Well, they were aboard the *Portmar,* sunk with the *Portmar.*

Q. Were those guns later rescued by Captain Williams? A. Yes, sir.

Q. And were their supplies and stores also taken off the *Portmar* as far as you know? A. Some of it, but it was found to be ruined.

Q. After you left the *Portmar* on the evening of March 3, 1942 did you ever see the *Portmar* again in Port Darwin Harbor? A. No, sir.

Q. When did you leave Port Darwin? A. I left Darwin or the camp south of Darwin the 10th of March.

1044 Q. What were you and your crew doing between March 3rd and 10th? A. We were under military arrest.

Q. What was the occasion for that? A. The reason was that when I had visited the ship for the last time on March 3rd I went aboard the *Admiral Halstead,* stayed with the crew and helped them get as much gasoline ashore as possible during the night.

Q. That was the night of March 3rd and 4th, was it? A. That's right. In the morning they took us up in a couple of trucks up to the camp. We got our breakfast, cleaned up a bit, and about noon the Adjutant of the regiment, Captain Dean, he came around and he says "Captain, I want you to get ready to take your crew down to the *Admiral*

Halstead to take out some more gasoline, it is very important that we get that gasoline out".

Q. What did you say? A. We had come back very tired and almost done up. We had just cleaned up a little bit.

Q. Had you been working all night? A. We had been working all night, yes. It was red hot, way up to 105 and 110, almost impossible to sleep, and we had no sooner cleaned up before he came and wanted us to go back to work again. He said "I want you to be back on the *Admiral Halstead* by 4 o'clock". I says "Captain Dean, I am not going to take my crew down there tonight and I am not 1046 going to give orders that they are going down". He said, "Do you mean, Captain, that you refuse to do as I tell you?" I said "In this case, yes" so he left a few minutes afterwards, and two men came and took me out of the tent—they rounded up all my men, they made us move down to a plot staked out by one of Captain Dean's lieutenants, put four machine guns in the corners and told us not to get outside of those, not to get over the line there and Captain Dean came along, he said "All of you men that are willing to go to work you are released from arrest right now". He said "The rest of them will stay until they do work". There was two men went out, the second mate and the wireless operator, so I said "You two men you go up to the 1047 camp, you can't do no good on the ship". The rest of us was kept and we were there until we left Darwin.

Q. Were there any soldiers in that camp? A. Yes, sir.

Q. What were they doing while you and your crew were on the *Admiral Halstead* on the night of March 3rd and 4th? A. They were doing absolutely nothing.

Mr. Collins: Are we bringing suit for the work that the captain and his crew did in place of the Army? If not what is the purpose? It would be interesting but I think irrelevant.

Q. What were those soldiers doing on March 4th during the daytime when Captain Dean wanted your men to go

back to the *Admiral Halstead*? A. Well, there were so many of them I don't know what they were all doing but it seemed to me that they were not doing anything and I found out, and the crew also found out, that there was about 200 Australian longshoremen that was kept in a camp nearby that absolutely refused to work and that wasn't made to work.

Q. While you were under arrest there did you make any effort to reach the military authorities and persuade them to get you and your crew transported to Adelaide or to a
1049 Tidewater port where they could be sent home? A. Not while I was under arrest. Previous to being put under arrest I had seen everybody that could help me about being transported to the South Coast.

Q. In seeking transportation to the South Coast for you and your crew had you formed any judgment as to the possibility of salving the *Portmar* and recovering her, repairing her and restoring her to the same condition that she was in before the first attack in the Timor Sea? A. Yes, sir.

Q. What was your judgment as to the possibility of salving the ship, repairing her, restoring her to her former condition, and the cost of doing those things? A. My judg-
1050 ment was that such a thing under the conditions existing and prevailing was absolutely impossible.

Q. Was it in the light of that judgment that you endeavored to obtain transportation for your crew to Tidewater so that they could be sent home? A. Yes, sir, that was one of the reasons. One of the main reasons was that I wanted to get in touch with the owners, let them know what had happened. Before they arrested me I had seen everybody and I had even made them take telegrams from me that they faithfully promised they were going to send over the line to Melbourne and Sydney. I had sent telegrams to the American Consul in Sydney, I had sent telegrams to Bethlehem Steel ,because they would not let me address anything to Calmar Steamship Corporation—I

believe that was the Australians did not know about the Calmar Steamship.

Q. Wait a minute. Did all this occur while you were up there in Port Darwin? A. Yes, sir.

Q. Let me understand you: Did you send telegrams from Port Darwin to anybody? A. I handed the telegrams as I had written them over to Colonel LaRue.

Q. Do you know whether those telegrams were ever sent by Colonel LaRue? A. They were never sent.

Mr. Mount : We call for the production of copies of those telegrams if you have them. 1052

Q. Have you copies of those telegrams, Captain? A. No, sir, I have not.

Mr. Murphy: We haven't any copies of them so far as I know.

Q. When were you released from arrest, you and your crew? A. We were taken by military police from the place where we were kept under arrest down to the train that took us down to Durban.

Q. I asked when, what was the date? A. March 10th.

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Adjourned to August 1, 1945 at 10 A. M.

Met, pursuant to adjournment, August 1, 1945, 10 A. M.

Present as before.

AXEL MICHELSON resumes the stand.

Direct examination continued by Mr. Murphy:

Q. Captain, yesterday afternoon when we adjourned we had gotten down to the time you were kept in the military

1054 camp preceding your departure from Darwin. Before going ahead I want to go back for a couple of questions which I omitted to touch on. I believe you testified that when you went across the Timor Sea under convoy of the cruiser *Houston* you were under routing orders which you received from the Australian Naval Control officer at the convoy conference on board the *Houston* on the night before sailing. What did you do with those written orders for that sailing after you got back to Darwin? A. I turned them back to the Australian Naval Control.

1055 Q. Do you remember when you turned them back to the Australian Naval Control officer? A. No, sir. I think that I turned them back the same time I turned back my code books and directives.

Q. Where did you keep routing orders of that character? A. I kept them all over my person.

Q. Do you remember whether or not you got a receipt for those orders when you turned them in? A. No, sir, I thought the receipt for the written orders was included in the one you showed me yesterday.

Q. I show you the receipt which is Libellant's Exhibit 5 for identification and ask you to look at it and see if you can identify any of the entries in that receipt as covering

1056 the routing orders which covered the convoy across the Timor Sea? A. (Referring to Exhibit 5) No, sir, it is not mentioned here.

Q. Do you remember whether or not you got a separate receipt for those orders? A. No, sir, I don't believe I did, I don't remember I did.

Q. What was the tidal range at Port Darwin, that is the height of rise and fall of the water between low water and high water? A. It was a little different at different points in the harbor. Close to the mouth of the harbor it was the least.

Q. At the point where the *Portmar* lay beached what was the tidal range? A. I would say it was about 27 feet. There was a great difference of opinion even among the

experts and a real good tidal survey of the harbor had never been made.

Q. Well, your best recollection is that it was about 27 feet? A. Yes, sir, by my own observations. Will you pardon me a moment, Mr. Murphy, I believe I have some notes on the tide; I am not quite certain but I remember I put something down.

Q. All right, by all means look at them. A. (Referring to notebook) At the entrance to the Bay and near the shore all the way along the Darwin jetty was about 22 feet but this would increase as you went higher up the Bay and 1058
where the *Portmar* finally landed I would say it was 27, 28 feet.

Q. On the evening of March 3rd when you left the vessel what was your intention with regard to the ship? A. I had not at that time exactly formulated any intentions.

Q. Well, let me ask you this: When you left the vessel on the evening of March 3rd did you intend to return to the vessel? A. Yes, sir, the ship was mine and I intended to take care of her as long as possible.

Q. Before leaving Port Darwin on the 10th of March did you receive any paper from the Army Authorities regarding your unloading of the *Admiral Halstead*? A. 1059
Yes, sir.

Q. I show you a paper and ask you what that is? A. I had several times been to see the commanding officer, Colonel LaRue who wrote this letter, and asked him to give my crew transportation up to the South Coast of Australia so I could get them off my hands and he told me that he would do so as soon as it became possible. He told me also that he needed them badly to help get some of this gasoline ashore from the *Admiral Halstead.*

Q. Well, just confine yourself to the question. Just tell us what that paper is that you have got there? A. That is a thanks for the help that my crew gave getting the gasoline off the *Halstead.*

1060 Q. Is it a letter addressed to you by Colonel LaRue? A. Yes, sir.

Q. How did you get that letter? A. He give it to me himself.

Q. This letter is dated February 26, 1942. When did Colonel LaRue hand you this letter? A. I don't know any date. He handed it to me when they put us aboard the train.

Q. And when did they put you aboard the train? A. That was on the 10th of March.

1061 Mr. Murphy: I offer the letter to be marked for identification as Libellant's Exhibit 6.

It is so marked.

Mr. Collins: The letter was given to you on the date of the letter, February 26th?

The Witness: No, sir, the letter was given to me just when we boarded the train, a few minutes before. Colonel LaRue was there with the military police and an Australian, some officer, his name was Captain Degrucia.

Q. And on what date was that again? A. I think it
1062 was March 10th. Anyway it was the same date and at the same time as we were put aboard the train, which was almost done forcibly.

Q. Forcibly? A. Well, we were brought down to the train by the police, by the men that had kept guard over us.

Q. To the best of your recollection that was March 10th, is that right? A. Yes, sir, but that was the time—I know for a fact that was the time I got the letter from him. I didn't know until now you tell me it is dated February 26th, I didn't know, I never had taken a look at the date, but that is the time I got it, that's all I know.

Q. Up to the time you boarded the train had you been able to note a protest as to the events which had occurred prior to that date? A. No, sir.

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Q. Had you been able to send any word to your owners? A. No, sir. I had seen Colonel LaRue, they had accepted telegrams to the Consul General in Sydney, they accepted telegrams to Bethlehem Steel in New York, they had told me that the telegrams would be sent if it was possible.

Q. At that time did you know that any telegrams had actually gone through? A. I was not concerned about any other telegrams than my own.

Q. I am referring only to your own telegrams—did you know that any of your own telegrams had been transmitted to your owners? A. No, sir, I didn't know.

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Q. Had you received any instructions from your owners as to what you were to do? A. No, sir.

Q. When you boarded the train on March 10th with your crew what was your intention with regard to the *Portmar*? A. My intentions were to get in touch with my owners as quick as possible and tell them exactly what had happened, receive their instructions and carry out the instructions I got from them.

Q. On the 8th of April 1942 where were you? A. In Melbourne.

Q. Had you seen the *Portmar* at any time between March 3, 1942 and the 8th of April? A. No, sir.

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Q. As to the possibility of salvage, repair and restoration to former condition of the vessel on what factors was your judgment based as of the time you left Port Darwin on March 10, 1942? A. That it could not be done, that it was out of the question altogether.

Q. What were the reasons which led to that conclusion of yours? A. First the condition of the ship and the situation she was in. Moreover the military situation and the few resources available in Darwin, there was absolutely nothing, there was no facilities, there were no shops, there were no mechanics, there was no material of any kind. If anything had to be done to the ship the ship had to be moved out of Darwin. She was at the bottom of the sea part of

the time, more than half the time—the nearest port where anything at all could be done to her was two thousand miles away, she had to be towed through waters that was every day and every hour patrolled by the Japanese Navy and was absolutely dominated by the Japanese Navy and air force. If she finally got there to a port where there was any facilities there would not be enough of them, there was no drydock, no yards, there was no repair facilities, nobody in the country out in Australia had done any repair work to a ship, the British had always seen to it that that was
1067 done in England instead of Australia. They had no steel in Australia to do anything with, they had no men.

Q. How about the possibility of getting vessels to tow the *Portmar* from Port Darwin around to a port where even temporary repairs could be made? A. Well, I did not know of any and I could not see that there was any other way of doing it than let the British or Australian Navy do it but first the ship had to be raised, there wasn't even a pump in Darwin to raise her with. There was no way to use a pump unless you had steam to run it with.

Q. Are we to understand that there were no private towing vessels available so far as you knew? A. I didn't know every towing vessel there was in Australia. I knew
1068 that they were desperate for tow to take care of all the wrecks of all the ships that were wrecked along the coast. I knew that ships in the same fix, I mean ships that had been stranded or—they had to lay for weeks, sometimes for months, they even had to be left there altogether because they could not effect a few minor repairs and get them towed back to where possibly more repairs could have been made.

Q. How about the possibility of a Japanese invasion at Port Darwin? A. Well, that was impending every day, that was taken for granted by all the military authorities.

Q. Did you consider the cost that would be involved in salving and refloating the vessel, making her fit for a tow, the cost of towing her to a port for temporary repairs,

the cost of moving her to a port for permanent repairs where there was a drydock, the cost of the repairs themselves, the possibility of the amount of salvage charges that would be made if the vessel were raised, and similar items—did you consider those things? A. Yes, I did.

Q. How did they enter into your consideration? A. Well, I hardly know how to express myself but it struck me that those costs, if they could by some miracle be done, they would be so staggering that there was no common sense in it.

Q. Yesterday in answer to a question as to what your 1070
judgment was you said, if I remember rightly, that you considered that the possibility of salving, repairing and restoring the vessel to her former condition was out of the question, that it was impossible. Now, what did you mean by the word "impossible"? A. I don't know what I meant at the time. I did not mean it was impossible in a sense that it could not be done—anything can be done as long as you are willing to throw money and efforts enough out to get it done but it could not be done at a cost in my estimation that it was worth considering, even considering the value of a repaired ship in wartime.

Q. By that last remark did you mean that the cost of 1071
doing the whole job would exceed the value of the ship after you got the job done?

Mr. Mount: I object to that question.
Mr. Collins: Object to it as leading.

Q. All right, I will put it this way: What did you estimate the total cost of salving, towing, repairing and restoring the vessel to former condition would be in relation to the value of the ship after you got the job done? A. It would be several times the value of the vessel.

Q. That was your judgment on March 3, 1942? A. Yes, sir.

Q. Was it your judgment on March 10, 1942? A. Yes, sir.

1072 Q. Did you make any change in your judgment as of April 8, 1942 when you were in Melbourne? A. No, sir.

Q. No change in your judgment? A. No, sir.

Q. Just for the record, what was the nearest drydock to Port Darwin that could handle a vessel of the size of the *Portmar*? A. Sydney.

Q. Now, was it your intention to abandon the *Portmar* on March 3, 1942? A. No, sir.

Q. Was it your intention to abandon the *Portmar* on March 10, 1942 when you left Port Darwin on the train?

1073 A. No, sir, I never abandoned anything anywhere.

Q. Now, you said that among the factors you considered in reaching your judgment as to the possibility of salving, recovering and restoring the vessel to her former condition was the condition of the vessel as she lay. Now, will you please state in as great detail as you can what the condition of the vessed was as she lay on the beach at Port Darwin at the time you last saw her March 3, 1942? You can refresh your recollection from any material you have there. A. Well, there is a big fine ship laying at the bottom, weakened in her structure from fore to aft, which I know that she was. She was open to the sea, water was running in and out of her, she was almost full of water in her No. 5 hold,

1074 No. 4 hold, the engineroom, the boiler-room, the poop, the shelterdeck, the water that was running in and out of her was not water that could hardly be called water, it was more mud and muck and fuel oil than anything else. The whole Darwin Bay was covered with a film of—oh, it was more than a film because it was perhaps quarter of an inch thickness of fuel oil all over the Bay. Where she was there were several little creeks coming out muddying the water up. Wherever I looked, down the engineroom and fireroom or anywhere in the ship on a falling tide there was inches of mud laying around on anything and everything. Looking down the engineroom all the pipes were shattered and bare of covering. I knew from the engineer's report that the boilers had moved in their saddles and the auxiliaries had

moved in their foundations. I knew that all the quarters throughout the ship from forward to aft were demolished and broken up, shattered in all directions.

Mr. Mount: May I interrupt this a second. Now, I am not going to object to the master's telling what the engineer said he found——

Mr. Murphy: As an official report.

Mr. Mount: (Continuing) provided you will agree to put in a surveyor's report and Williams' testimony as to what was actually done and what was actually found. Otherwise I shall object to any 1076
testimony that the master gives about reports to him.

Mr. Murphy: Well, you may object but I will not agree to admit Williams' testimony. You will have to call him as a witness. I maintain that the master is entitled to testify to official reports he received from the chief engineer in the line of duty. You may note your objection.

Mr. Mount: I do note my objection and I give notice that I will bring this to the attention of the Court by motion. You have included in your claim against the underwriters the item of salvaging the vessel and I shall insist that no evidence be admitted 1077
as to that except by an exemplified copy of the record in the Court which granted the salvage award unless you will stipulate.

Mr. Murphy: We have not included in our claim against the underwriters an item of salvage of the vessel. We have included in our claim against the underwriters as for particular average if the abandonment was not valid, which we claim it was, the satisfaction of a decree of the Court of Australia—is that what you mean?

Mr. Mount: I say that you cannot and I will object to any proof of your item of satisfaction of a decree in Australia unless you produce an exemplified copy of that record and that decree.

1078 Mr. Murphy: Very well, but we have not come to that yet.

Mr. Mount: Well, I am giving you notice that unless you agree to that I will have to object to more of this testimony the master has been giving, and I have been very patient in letting him tell all about conditions all over Australia, and that stops unless you will tell me now that you will admit the surveys of the vessel and testimony of Williams as to what was done in the salvaging of the vessel, and an exemplified copy of the record in the salvage suit.

1079 Mr. Murphy: The surveys of the vessel I intend to put in myself. I will not admit Mr. Williams' testimony given in another action. I maintain as to the original point that you opened up with in this discussion that the master is entitled to testify to official reports made to him by the chief engineer in line of duty.

Mr. Mount: No, I won't agree that the master is entitled to state what the conditions in the engine-room were.

Mr. Murphy: He is certainly entitled to say what he saw.

1080 Mr. Mount: He is, but he has already testified, as I recall it, that he did not go in the engineroom or at least if it was not that, that he knew very little about the engineroom.

Mr. Murphy: He has not testified that he did not go in the engineroom.

Mr. Mount: I won't insist because I am not sure, but he certainly said he knew very little about the engineroom.

Mr. Murphy: Well, the record will show whether he said that.

Mr. Mount: Yes. Now, let me get this clear: You intend to introduce in evidence the surveys of the vessel?

Mr. Murphy: Yes.

Mr. Mount: That will be the joint survey made at Melbourne?

Mr. Murphy: Yes, all the surveys except Lloyd's surveys which do not concern us.

Mr. Mount: And you state that you will not stipulate the testimony of Mr. Williams?

Mr. Murphy: By all the surveys I mean I will introduce the surveys which were made at our instance. You of course can introduce the surveys made at yours. 1082

Mr. Mount: Well, wasn't the survey at Melbourne a joint survey in which all joined?

Mr. Murphy: Yes. I have no objection to that going in. You will probably introduce that. No, the joint survey was made at Sydney.

Mr. Mount: Yes.

Mr. Murphy: As to that survey, we all know about it. You will introduce it and I won't object to it. I will introduce the surveys made at Brisbane at our instance, yes, and when I come to it I will undoubtedly introduce the decision of the high Court making the salvage award because that goes to particular average and I shall prove that we satisfied that 1083 award, but I will not consent that Mr. Williams' testimony be made testimony in this case, so that you have full notice of that now.

Mr. Mount: I am glad I have.

Mr. Collins: I move to strike out that part of the captain's testimony relating to what the chief engineer is alleged to have found in the engineroom and what he is alleged to have reported to the captain as being hearsay, the best evidence being that of the chief engineer himself. I think a great deal of latitude has been permitted in allowing the captain to testify as to matters which he may or may not have had any personal knowledge of at all. I assume the Court

will give such testimony the weight it is entitled to, if any.

Mr. Mount: To make it clear, I move that the master's answers as to what happened in the engineroom based on what the engineer said to him be stricken out.

Mr. Murphy: For the reasons stated I oppose that motion.

Q. All right, Captain, go ahead, resume. A. All the 4 and 5 holds were full of water and mud and muck, all the
1085 ceiling, tank tops, all the woodwork and hatches in No. 4 and 5 hold were floating around and away at high water, the standing and running rigging of the ship had more or less been shattered and cut to pieces by cannon and shrapnel fire, all the navigating equipment of the ship was gone, there wasn't a thing left, ice machine and all the refrigerating machinery was demolished by shrapnel, the ship's machine shop and all tools, benches, facilities for making repairs in the engineroom was demolished and shattered, had disappeared, there were none of the boatswain's stores, carpenter's stores or mate's stores or engineer's stores left anywhere, the ship was laying at the bottom of the sea and
1086 had to be raised before anything could be done to her in the line of repair whatsoever.

Q. In that connection, what effect did the rise and fall of the tide have on the ship? A. It had the effect that the aft end of the ship was stuck in mud and did not rise and fall with the tide whereas the forward end of the ship raising and falling twenty some feet at every raise and fall of the tide was tending more or less to strain the ship, more for every tide that she was there.

Q. All right, Captain, you got as far as the rigging being shot away—go ahead. A. There was no equipment or tools left aboard the ship to help in the re-floating of her else I realized that it could be done if such equipment had been available but the nearest that could be had was to be taken

three thousand miles through the desert of Australia. There was no possibility of getting it anyway because there was no access to Darwin Harbor on account of the Japanese.

Q. How about the condition of the crew's quarters aft in the poop? A. Well, there wasn't anything left of the crew's quarters. There was just the shell left aft there, everything was busted away and demolished and washed away.

Q. How about the midship accommodations? A. The same thing, there was just the torn shell enclosure and that was all because there was nothing left in the line of partitions between the rooms—bulkheads, everything was gone. 1088

Q. What was the condition of the decks? A. The decks were perforated from fore to aft by machine gun fire. That included winches and steam pipe, steam line, the smokestacks, ventilators, engineroom skylight, fireroom skylight.

Q. What was the condition of the cargo booms? A. There were only one or at the most two cargo booms that had not been shot through or splintered by machine gun fire. All the rigging, running and standing, more or less had to be replaced.

Q. What was the condition of the radio house? A. The radio house was blown off its foundations, all the instruments were busted or had been taken out or had disappeared. 1089

Q. Was the condition of the standard and steering compasses the same as you have already described? A. Yes, there was just pieces left of it.

Q. What about the poop mooring telegraph and sounding machine? A. The poop was demolished, shot, had been torn out, the sounding machine had disappeared, been shot off, I believe there was a piece left of the column—engineroom telegraph from the poop was demolished.

Q. What about the telemotor piping? A. The telemotor piping was bent and I believe perforated, broken in places.

Q. Lifeboats, what about the condition of your lifeboats? A. No lifeboats left, they were all gone, they all disappeared.

Q. Now, as to the condition of the shaft alley, were you able to get into the shaft alley and see that? A. No, sir.

Q. How about the internal condition of the engines, could you determine that?

Mr. Mount: I object to that. The master is not an engineer. You can call the chief engineer if you want to.

Mr. Collins: I join in that objection.

Q. Answer the question please. A. I am not an engineer
1091 but it would not take an engineer to see that it would take weeks and possibly months of repair to make the engines fit to ever run again. I have gone to sea a good many years and I have been in steamships for more than thirty years. I am not wholly ignorant of what can be done with a ship's engines.

Q. Was there any damage to the electric wiring in the ship? A. It was practically non-existent, torn up and blown up, had been torn out when the quarters were demolished when concussions struck them.

Q. When did you next actually see the *Portmar* after you last saw her at Port Darwin on March 3, 1942? A.
1092 That was way into the summer in late July, the following summer.

Q. At what port? A. Brisbane.

Q. When did you arrive at Melbourne after leaving Port Darwin March 10, 1942? A. March 22nd.

Q. What did you do first? A. First I took care of my crew.

Q. What day of the week was March 22, 1942? A. That was a Sunday.

Q. Did anyone meet you at the train at Melbourne on arrival? A. There was no one met us but shortly after we had arrived and I had arranged to have the crew taken up in a military camp the American Consul, Mr. Hunt, arrived.

Q. Where did he arrive when you first saw him? A. Well, he was asking for the master of the *Portmar* and somebody pointed me out.

Q. I said where were you when you first saw him? A. On the station.

Q. At the railroad station? A. Yes, sir.

Q. Did Mr. Hunt, the American Consul, go with you to the military camp? A. Yes, he told me about——

Q. No, don't say what he told you in view of the objections made here—just answer the question. (Repeated.) Did Mr. Hunt, the American Consul, go with you to the military camp? A. Yes, sir. 1094

Q. Did you tell Mr. Hunt that you wanted to note a protest? A. I gave him a short condensed picture of what happened.

Q. Answer the question, please. (Repeated.) Did you tell Mr. Hunt that you wanted to note a protest? A. I believe I did.

Q. Did you note the protest on Sunday, the day on which you arrived there? A. No, sir.

Q. Did you see Mr. Hunt, the American Consul, on Monday, March 23rd? A. Yes, sir.

Q. Did you note the protest with the American Consul on March 23, 1942? A. No, sir. 1095

Q. I show you a paper and ask you what that is? A. This is a protest.

Q. Is this the first protest you noted? A. No, sir.

Q. Which was the first protest that you noted? A. The first protest I noted was noted before a notary public, Mr. Hamilton, in Melbourne.

Q. I show you four papers, an original protest dated March 23, 1942 before the American Consul, an extension of that protest dated March 25, 1942 before the American Consul, a note of protest before a notary, Edward James Hamilton, dated March 27, 1942 and an extension of that protest before the notary, Edward James Hamilton, dated March 27, 1942—now, look at those papers and tell

us the order in which you made those protests. A. The protest noted before the notary, Mr. Hamilton, was the first one I noted.

Q. And what was the next one? A. That was extended later on, that was the next. The other two were later on noted before the American Consul and ante-dated or dated back.

Q. Did you ask Mr. Hunt, the American Consul, on March 23rd to take your protest? A. Yes, sir.

Q. Did he take it on that date? A. No, sir.

1097 Q. Why not? A. Because they were so busy in the Consulate that it was an absolute impossibility for them to take my protest. They had hundreds of American ship-wrecked sailors and men around that mostly were in bad straits and had to be taken care of immediately.

Q. What did the American Consul tell you to do? A. He told me to go to a notary and get a note of protest as soon as possible and he said "Captain, when this rush is over and I get those men taken care of I will take care of your protest and there isn't anything going to happen out of the way because I cannot note your protest today."

Q. After that did you go to the notary, Edward James
1098 Hamilton, and note the protest and the extended protest dated March 27, 1942? A. No, sir, after that I went over and hired an agent.

Q. We will come to the agent again. What I mean is with respect to protests, was the next thing you did to go to the notary, Edward James Hamilton, and note your protest and extension of protest both dated March 27, 1942? A. Yes, sir.

Q. And then did you take those protests back to the American Consul after that? A. Yes, sir.

Q. And did the American Consul prepare the protest dated March 23rd? A. I beg your pardon, I did not take them back to the American Consul, I went up to the American Consul and noted protest there too.

Q. You went to the American Consul and noted protest and extension of protest? A. Yes, sir.

Q. And those were dated back to March 23rd and March 25th respectively? A. He asked me if I had noted protest before anybody else and I told him I had done as he told me, I had noted before a notary, and he asked to see them.

Q. And did you give him the copies of the protest and extension of protest which you noted before the notary? A. I showed them to him, yes, sir.

Q. After that did he note your protest of March 23rd and your extension of protest of March 25th? A. Well, he 1100
examined me and my crew and found out that the facts as stated in those protests of Mr. Hamilton were actually the facts and I believe his protests were worded very much the same after he had found out that such was the case.

Mr. Murphy: I ask that these protests be marked for identification as follows: Profest noted before the American Consul March 23, 1942 as Libellant's Exhibit 7 for identification; extension of protest before the American Consul dated March 25, 1942 as Libellant's Exhibit 8 for identification; protest noted before Edward James Hamilton, notary public, dated March 27, 1942, as Libellant's Exhibit 9 for identifi- 1101
cation; extension of protest noted before Edward James Hamilton, notary public, dated April 2, 1942, as Libellant's Exhibit 10 for identification.

They are so marked.

Q. Now, Captain, you said a moment ago that you hired an agent when you got to Melbourne. Who was that agent? A. Dalgety & Company.

Q. Did you consult anybody about what agent to hire? A. Yes, I believe I told Mr. Hunt that I would like to get Dalgety if they were in town. He said that Dalgety would be just about the best agents I could hire in Melbourne.

Q. After you got to Melbourne did you succeed in sending a cable to your owners? A. I told Mr. Hunt that I had

to get in touch with my owners. He told me that that would be very important.

Mr. Collins: I object to what Mr. Hunt said and move to strike it out.

Q. Just answer the question, Captain. (Repeated) After you got to Melbourne did you succeed in sending a cable to your owners? A. Yes.

Q. I show you a copy of a cable dated Melbourne, March 24th, and ask you if that was the message you sent? A. Yes,
1103 sir.

Mr. Murphy: I ask that it be marked for identification.

The cable is marked Libellant's Exhibit 11 for identification.

Q. Now, this cable tells nothing about the disaster or the particulars of the disaster. Was there any reason why you did not put in this cable a statement of the facts of the bombing and the position of the vessel? A. Yes, sir.

Q. What was the reason? A. They made me believe that my owners knew everything about it. The American
1104 Naval Attache, Captain Causey, he told me to keep the telegram down to the least possible number of words.

Q. Is that the American Naval Attache? A. Yes, sir.

Q. Was that the reason for the brevity of this cable? A. Yes, sir.

Q. Have you among your papers any communications from the American naval authorities at Port Darwin regarding the condition of the *Portmar,* or perhaps I had better ask you this question: Does that letter you hold in your hand come from your own file or have you seen it before? A. I have never seen it before.

Q. All right, let me have it.

(Witness hands the letter to Mr. Murphy).

1105

Mr. Murphy: I offer for identification a letter on the letterhead of the United States Maritime Commission to Mr. H. W. Warley, President, Calmar Steamship Corporation, dated April 3, 1942, signed by Mr. James G. Outler, Ship Control Section, War Shipping Administration, as Libellant's Exhibit 12 for identification.

It is so marked.

Mr. Collins: I admit the authenticity of the letter but object to it on other grounds, including the particular objection that the comments as to the condition of the vessel are pure hearsay, not admissible as evidence.

1106

Mr. Mount: No objection.

Q. Captain, did you get a reply to your cable of March th which is now Libellant's Exhibit 11? A. Yes, sir.

Mr. Murphy: I offer for identification copy of cable from H. W. Warley, President, Calmar Steamship Corporation, to Axel Michelson, dated March 27, 1942.

Mr. Mount: I will object to all but the first sentence of that cable as being a self-serving declaration, immaterial as far as the master and his actions were concerned and merely an attempt to prove by something less than the best evidence what is contained in the rest of the cable. I have no objection to the first sentence up to the word "Stop".

1107

Mr. Murphy: First of all, on or about July 23, 1945 Mr. Mount served on this firm a notice to produce calling on us to produce all cables, letters, reports, messages, statements and writings sent or received and all marine protests made, noted or extended by the master and the chief officer of the *Portmar*.

Mr. Mount: Correct.

1108 Mr. Murphy: This cable is within that call. Next, Mr. Mount objected on the ground of the best evidence rule. Do I understand that you object to this on the ground that this is just a file office copy, libellant's office file copy, rather than the actual paper received by the ship master in Melbourne?

Mr. Mount: No, I object to it on the matter of substance, not on the fact that this is a copy.

Mr. Murphy: Not on the best evidence rule?

Mr. Mount: Well yes, on the best evidence rule that you have a witness here in New York who can

1109 testify as to the latter part of the cable.

Mr. Murphy: Then we understand that you do not object on the ground that it is not the actual paper received by the master in Melbourne?

Mr. Mount: No, if Mr. Groom tells me that that cable was sent, that is good enough for me.

Mr. Murphy: Does Mr. Groom tell you that?

Mr. Groom: Yes.

The copy of cable is marked Libellant's Exhibit 13 for identification.

Q. Captain, while you were in Melbourne did you hire

1110 a firm of lawyers to represent the *Portmar* and her owner? A. Yes, sir.

Q. Whom did you retain? A. Malleson Stewart.

Mr. Mount: What is that?

Mr. Murphy: Malleson Stewart & Company, solicitors, Melbourne.

Q. When did you consult them, if you remember—just give me the date. A. I couldn't tell you the exact date.

Q. Was it in the first week you were there? A. Yes, sir, certainly within the first week, it was one of the first days.

Mr. Murphy: I offer the cable sent by Malleson Stewart & Company, solicitors, to Calmar, Bethle-

hem Steel Corporation, dated Melbourne, March 30, 1942, to be marked for identification as Libellant's Exhibit 14 for identification.

It is so marked.

Q. Now, Captain, in the cable marked Libellant's Exhibit 13 Mr. Warley, President of libellant, asked you for the itinerary of the ship since leaving the United States. Did you answer that cable?

Mr. Mount: I object to that on the same grounds as my previous objection to the cable itself. 1112

A. Yes, sir.

Q. Is that your reply to that cable, Libellant's Exhibit 13 (handing witness paper)? A. Yes, sir.

Mr. Murphy: I wish to state that in my previous remark which was objected to by Mr. Mount, we are only going over all the ground which he demanded be covered by production of all the documents in his notice to produce.

Mr. Mount: Yes, but I did not demand that they all be introduced or stipulate that they were all relevant or admissible. 1113

Mr. Murphy: Very well. I offer for identification cable sent by Captain Michelson to libellant dated Melbourne, April 1, 1942.

It is marked Libellant's Exhibit 15 for identification.

Q. Captain, there has been question here as to the cable you received on March 27th, Libellant's Exhibit 13. It begins with the words "Your 23rd 24th". Mr. Mount has suggested that that may refer to two cables which you sent to Calmar. I wish to ask you whether prior to receipt of Libellant's Exhibit 13 March 27th you sent any other cable except Libellant's Exhibit 11 dated Melbourne,

1114 March 24th—was there any other cable that you sent except this one before you got Mr. Warley's cable of March 27th? A. No, sir.

Q. I show you another cable dated Melbourne, April 6th, and ask you if you sent that cable to libellant? A. Yes, sir.

Mr. Murphy: I offer that cable to be marked for identification.

It is marked Libellant's Exhibit 16 for identification.

1115 Mr. Murphy: I offer for identification cable sent by libellant to Malleson Stewart & Company dated April 7, 1942.

It is marked Libellant's Exhibit 17 for identification.

Q. I show you, Captain, a copy of cable sent by Mr. Warley, President of Calmar Steamship Corporation, to you dated April 10, 1942 and ask you if you received that message at Melbourne? A. Yes, sir.

Mr. Murphy: I offer that for identification as Libellant's Exhibit 18.

1116 It is so marked.

Q. I show you a cable dated Melbourne, April 13, 1942, sent by you to Calmar Steamship Corporation—did you send that cable? A. Yes, sir.

Mr. Murphy: I offer that for identification as Libellant's Exhibit 19.

It is so marked.

Q. I show you copy of cable addressed to you by Mr. Warley, President of Calmar Steamship Corporation, dated April 16, 1942 and ask you if you received that message? A. Yes, sir.

Mr. Murphy: I offer this cable for identification as Libellant's Exhibit 20.

It is so marked.

Q. I show you a hand-written letter apparently written by you to Mr. Warley, President of Calmar Steamship Corporation, dated Melbourne, April 17, 1942, and ask you if that letter is in your handwriting and if that is your signature at the foot of that letter? A. Yes, sir, I wrote that letter.

1118

Mr. Murphy: I offer for identification hand-written letter by Captain Michelson to Mr. H. W. Warley, President of Calmar Steamship Corporation, with for convenience a typewritten copy attached.

It is marked Libellant's Exhibit 21 for identification.

Q. How did you send this hand-written letter which is Libellant's Exhibit 21 for identification? A. I sent that home with one of my men that had been wounded and had been in the hospital and as a consequence he was too late to be sent home with the rest of the crew. He reported to me later on and when I got a ticket for him and got my message to send him home I asked him to take this along with him.

1119

Q. Was he the last of your crew to leave Australia except yourself? A. I believe so.

Q. Between the time when you completed noting your protests and the time you next saw the *Portmar* as you have already testified at Brisbane, what did you do in Melbourne with regard to the *Portmar*? A. I tried to keep in touch with what happened to the *Portmar* from day to day and I more or less succeeded in having an idea of practically right along what was happening. I kept in touch with my attorneys every day and consulted them.

I kept in touch with the American authorities such as the Consul and the American Naval Attache, Captain Causey.

Q. Did you try to get permission and transportation back to Port Darwin and the *Portmar*? A. Yes, sir.

Q. Did you succeed in that? A. No, sir.

Q. Did you receive any information while you were in Melbourne there that the ship had been re-floated? A. Yes, sir.

Q. Captain, I show you a cable sent by you to Calmar Steamship Corporation dated April 20, 1942—did you send
1121 that message? A. Yes, I did.

Mr. Murphy: I offer it for identification as Libellant's Exhibit 22.

It is so marked.

Q. I show you a copy of a cable from Mr. Warley, President of Calmar Steamship Corporation, to you dated April 21, 1942 and ask you if you received that message in Melbourne? A. Yes, sir, I received that cable.

Mr. Murphy.: I offer it for identification as Libellant's Exhibit 23.

It is so marked.

1122 Q. Now, Captain, I show you two cables, one to you from the shipowner, libellant, dated April 24, 1942 and one sent by you to the shipowner dated Melbourne, April 25, 1942. Now, which occurred first? Did you send the cable or did you receive the other cable first—just give us the order in which those things happened. A. I believe I sent this before I received that one (indicating).

Q. You now refer to your cable to Calmar Steamship Corporation of April 25th? A. Yes.

Mr. Murphy: I offer that for identification as Libellant's Exhibit 24.

It is so marked.

Mr. Mount: We do not object to this exhibit for identification as proof of a message sent. We do

object to its being accepted as proof of the statements contained therein.

Mr Collins: I take the same position and make the same objection.

Q. Now, Captain, in this cable which is marked Libellant's Exhibit 24 for identification, you started in by saying to your shipowner, answering Mr. Warley's cable of April 21st, that you were "assured previous understanding Army asserting ownership misapprehension". Who assured you of that? A. Colonel Plant in charge of American Sea 1124
Transport in Australia.

Q. Was that Colonel T G Plant? A. That is the former Vice President or President of the American-Hawaiian Steamship Corporation.

Q. Then the word "Stop" appears. Now, the next part of the message begins: "Diver's report follows quote". Now, that is the beginning of the diver's report, isn't it, from that word "Quote"? A. Yes.

Q. And then——

Mr. Mount: Don't read it into the record. Show it to him and ask him about it.

1125

Q. How far does the diver's report run in that cable? A. That is the diver's report (indicating on Exhibit 24).

Q. Where does it start—there (indicating)? A. Yes.

Mr. Murphy: I will put a red ring around the word "Quote".

Q. Now, how far does the diver's report go? A. Down to the word "Quote" again there (indicating).

Q. Down to the words "End quote", is that it? A. Yes.

Mr. Murphy: I will put a red ring around the words "End quote".

Q. That is the end of the diver's report, is that it? A. Yes, sir.

1126 Q. Where did you get that information? A. I believe I got that in Colonel Plant's office.

Q. Did I understand you to say that you saw a telegram? A. Yes, sir, I did.

Q. Where did you see that telegram? A. It was either in Colonel Plant's office or else it was Lloyd's agent, Mr. Sargent, in Melbourne.

Q. Now, from there on after the words "End quote" you say "Government Salvage Board officer now agrees" and then the following. Now, tell us where the agreement with your views of the Government Salvage Board officer
1127 ends—how far down should we read there as being what the Government Salvage Board officer agrees to? A. The word "Stop" there (indicating).

Mr. Murphy: I will put a blue ring around the word "Stop".

Mr. Mount: Is that the "Stop" after "Towing"?

Mr. Murphy: No, after the words "Perforated bottom".

The Witness: Yes. Mr. Williams told me that it had a perforated bottom.

Mr. Collins: I object to that and move to strike
1128 it out.

Mr. Mount: I make the same motion.

Q. After that word "Stop" the cable begins with the word "Informed takes six inch pump" and so forth—what is the basis of that information? A. That is the information I got from Captain Williams of the Salvage Board, direct information that he gave me face to face.

Q. How far does that information go in this cable, how far should we read that cable as being based on Captain Williams' statements to you? A. To the word "Stop".

Q. To the word "Stop" after the word "Flow"? A. Yes, sir.

Mr. Murphy: I will put a blue diagonal line after that word "Stop".

1129

Q. Now the words "Nearest drydock where ship was New Year stop", was that on information or was that your own statement? A. That was my own statement but it was information which I had gotten from the Lloyd's agent, Mr. Sargent, because I went up to him one morning and asked him to tell me where the nearest drydock was that would dock the *Portmar* and he told me there was some little dock above the drydock they had in Newcastle which was a few miles nearer. He finally looked it up and he made certain she could not dock in Newcastle on account of the dimensions of the ship.

1130

Q. How about the next statement "Tow difficult and risky"? A. That is mine.

Q. Now, the next statement as to the wartime powers of the Salvage Board, is that your statement or is that made on information you got from someone else? A. That is my statement made on information that I got from my solicitors.

Q. Now the next statement that the "Board has requested lease lend authorities finance salvage", where did you get that information? A. I heard myself personally in Sir Owen Dixon's office and later on I had it confirmed by information that I very likely got through my agents and solicitors.

1131

Mr. Mount: It is understood that our objection applies to each one of these.

Mr. Murphy: Yes, wherever applicable you object as hearsay.

Q. The next statement "Understand only concern lease lend and American Army recondition ship for use however desirable", what is the basis for that statement? A. Information obtained either directly from the American Army in Colonel Plant's office or else through my solicitors.

Q. The next statement is that the "Board advises two tugs necessary but doubtful any available". Where did you get that information? A. Lloyd's agent, Mr. Sargent, Manager of the Oriental Steamship Company.

1132 Q. The next statement "Is also doubtful whether dock available for several months stop"—what is the basis for that statement? A. I am not quite certain. I believe that was information I got through Dalgety's firm in Sydney.

Q. The next statement "No decision future action yet made", what is the basis for that statement? A. Well, that is undoubtedly a statement I made myself from the way things were and the situation was at that time.

Q. The next statement "Salvage Board will claim salvage reward for raising if ship finally recovered", what
1133 was the basis for that statement? A. The basis for that statement was a statement that Captain Williams had made at a meeting held down at Dalgety's where everybody concerned was present.

Q. Was the War Shipping Administration represented at that meeting? A. Yes, sir.

Q. By whom? A. The War Shipping Administration was represented by Mr. Watson of Dalgety and also by Chief Engineer Flannagan which they had hired from Matson Company in San Francisco.

Q. Were Lloyd's represented at that meeting? A. Yes, sir, Mr. Sargent was there.

1134 Mr. Collins: What was the date of the meeting?

—The Witness: I am sorry, I couldn't tell you, I don't remember.

Q. This meeting was held in Melbourne, was it? A. Yes.

Q. The next statement: "If facilitated by Army could return location twelve days stop", was that your own statement to your owner? A. That was my own statement because I was everlastingly trying to get back to Darwin. I tried time and again to get permission to go to Darwin and help to get there and the Army blocked me at every step, they did not want that.

Q. The next statement is "At present can do more here stop". That is your own statement? A. Yes, sir.

1135

Q. The next statement is "Mate and chief arriving soon". Was that your own statement? A. Yes, sir, that was meaning that the chief engineer and the chief mate whom I had sent home with the crew, they would arrive in New York soon and they would be able to give better information to the owner than I could do in a short cable.

Q. Finally "If shown telegrams could supply full information". You mean by that if shown to the mate they could give full information? A. Yes, if shown the cables they could explain a lot of things I couldn't.

1136

Recess taken to 2.15 P. M.

After Recess, 2.15 P. M.

Present as before.

Axel Michelson resumes the stand.

Direct examination continued by Mr. Murphy:

1137

Q. Now, Captain, here is a telegram dated April 24th from Mr. Warley to you. Will you look at that and tell me if you received that message while you were at Melbourne? A. I am fairly certain I did but I don't remember that I received this special telegram. There is but little doubt about it that I did but I don't remember that one.

Q. In any event, was it received before or after you sent the telegram April 25th which is Libellant's Exhibit 24, which begins "Yours twenty-first"? A. This is undoubtedly (referring to Exhibit 24) an answer to that one there (referring to Exhibit 23).

Q. Libellant's Exhibit 24 is an answer to Libellant's Exhibit 23 which is Mr. Warley's cable of April 21st? A. Yes, sir.

1138 Mr. Murphy: I am willing to offer this to be marked if you wish it. I don't think it is needed in the record.

Mr. Mount: It is not necessary.

Mr. Collins: No.

Q. I show you a cablegram dated April 28, 1942 and ask you if you sent that cable to Calmar Steamship Corporation? A. That's right, I sent that.

1139 Mr. Murphy: I offer it for identification as Libellant's Exhibit 25.

It is so marked.

Q. After your cable of April 28th did you continue to try to keep in touch with the situation regarding the *Portmar* at Port Darwin? A. Yes, sir, I did.

Q. Will you tell us whether you were able to get information as to what was going on at Port Darwin? A. Yes, sir, I was able to get reliable information right along.

Q. On May 22nd did you send this message to Calmar Steamship Corporation (handing witness paper)? A. Yes, sir.

1140 Mr. Murphy: I offer that telegram for identification.

It is marked Libellant's Exhibit 26 for identification.

Q. And did you also send this message on May 27th, Captain (handing witness paper)? A. Yes, sir.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 27 for identification.

Q. And did you also receive this message from Mr. Warley of Calmar Steamship Corporation dated May 26, 1942? A. Yes, sir, I did.

Q. Did you receive that message before or after you sent Libellant's Exhibit 27? A. I received this after I had sent that one there (indicating).

Mr. Murphy: He said "I received this" indicating the new cable, after he sent Libellant's Exhibit 27. I offer for identification this cable of May 26th from Mr. Warley to Captain Michelson.

It is marked Libellant's Exhibit 28 for identification.

Q. In this cable, Captain, now marked Exhibit 28 for 1142
identification you were asked to remain until after proposed inspection and survey of vessel in drydock probably at port where she was January 1st. Where was the *Portmar* on January 1st? A. Sydney.

Q. Prior to receiving this cable, Libellant's Exhibit 28, did you have any information that the vessel was going around to the East Coast of Australia? A. Yes, sir.

Q. What was it? A. Such information as I could pick up around Melbourne, some of it very good information though and received from good sources.

Q. When did you first learn so far as you remember that the *Portmar* had been floated at Port Darwin? A. 1143
That was on the 13th of April.

Q. Did the fact that the *Portmar* was afloat again change your judgment as to the possibility of complete salvage of the vessel, repair of the vessel and restoration to the condition she was in before the first bombing attack in the Timor Sea?

Mr. Mount: I object to the question as leading.

A. Not one bit.

Q. Did the fact that you learned on April 13th that the vessel was afloat again at Port Darwin have any effect at all on your judgment as previously expressed as to the possibility of salving, recovering and restoring the *Portmar* to her former condition?

Mr. Mount: Same objection, same ground.

1144 *Deposition of Axel Michelson—Direct.*

A. None whatever.

Q. When you received the owner's cable instructing you to remain, Libellant's Exhibit 28, did you make a reply? A. I believe I did.

Q. Will this refresh your recollection on that (handing witness paper)? I show you a cable dated May 27th from you to Calmar Steamship Corporation. A. Yes, I sent that to them.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 29 for identi-

1145 fication.

Q. I show you a copy of a cable from Mr. Warley, President of the Calmar Steamship Corporation, to you dated June 27, 1942. Did you receive that message? A. Yes, sir, I received it.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 30 for identification.

Q. Now, in this cable message of June 27th, Libellant's Exhibit 30, you were informed that the vessel was en route

1146 to the port where she was January 5th. What port was that? A. Brisbane.

Q. Did you reply to that cable? A. Yes, sir.

Q. Is this cable signed by you to Mr. Warley, President of Calmar Steamship Corporation, your reply to Libellant's Exhibit 30? A. Yes, sir.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 31 for identification.

Q. Did you make inquiries as to when the vessel might be expected to arrive at Brisbane? A. Yes, sir.

Q. What information did you get? A. I was able to keep in touch with the movements of the *Portmar* almost from the time she left Darwin until she arrived in Brisbane.

Q. How did you do that? A. Well, directly through Lloyd's agent, Mr. Sargent—I would go in there every morning, see Mr. Sargent.

Q. Was Mr. Sargent Lloyd's agent at Melbourne? A. Yes, sir.

Q. Did you subsequently leave Melbourne to meet the ship at Brisbane? A. Yes, sir.

Q. I show you telegram of July 1st from you to Mr. Warley, President of Calmar Steamship Corporation. Did you send that message? A. Yes, sir.

Mr. Murphy: I offer it for identification. 1148

It is marked Libellant's Exhibit 32 for identification.

Q. Captain, in this cable you say "Send three each deck engine and official logs". What did you mean by that? A. I asked them to send three blank logs of each kind because I was aware that my logbooks would be taken away from me when Court action was started and I wanted to make copies of them. I had also been notified that they found old engineroom logbooks up at Darwin and I had been told that if they arrived and if they came from Melbourne I would be given access to them so I could see them. That 1149 was why I asked for three blank deck logs and three blank engineroom logs.

Q. You wanted to make copies of the logs? A. I wanted to make copies of those logs on the desk, yes. I later on received just exactly what I had asked for.

Q. I have here what appear to be the smooth deck logs of the *Portmar* from November 20, 1941 to January 20, 1942 and from January 21, 1942 to February 19, 1942, also a photostat copy of the official log of the *Portmar*, entries running from February 15, 1942 onward. First as to the deck logs, are these the original smooth deck logs of the *Portmar*? A. Yes, sir, they are.

Mr. Murphy: I ask that they be marked for identification. Counsel have already seen these logs.

1150 Logbook of November 20, 1941 to January 20, 1942 is marked Libellant's Exhibit 33a for identification; logbook of January 21, 1942 to February 19, 1942 is marked Libellant's Exhibit 33b for identification.

Q. I now show you a photostat of what appear to be pages of the *Portmar's* official log from February 15th onward and ask you if those pages are in your handwriting? A. Yes, that is from the official log, all in my own handwriting.

1151 Mr. Murphy: I am informed that the original official log is in the files of the Shipping Commissioner at San Francisco. This photostat copy has been sent to us by Calmar Steamship Corporation. I ask that it be marked for identification. It has already been inspected by opposing counsel.

It is marked Libellant's Exhibit 34 for identification.

Q. Now, Captain, I show you a copy of a cable addressed to you by H. W. Warley, President of Calmar Steamship Corporation, dated July 20, 1942 and ask you if you received 1152 that message? A. Yes, sir, I received that.

Mr. Murphy: I offer that for identification as Libellant's Exhibit 35.

It is so marked.

Q. And did you send this reply to that last exhibit (handing witness paper)? A. Yes, sir.

Mr. Murphy: I offer the reply for identification.

It is marked Libellant's Exhibit 36 for identification.

Q. When did you leave Melbourne to meet the vessel at Brisbane? A. July 27th.

Q. When did you get to Brisbane? A. July 29th.

Q. What time of day? A. 4 or 5 o'clock in the afternoon.

Q. Was the ship there when you got to Brisbane? A. She had docked at a place called Tinkenba about noon the same day, so I was informed.

Q. Did you see the vessel there on the 29th when you got to Brisbane? A. No, sir.

Q. Did you employ surveyors to represent the shipowner and make an examination of the vessel? A. Yes, sir.

Q. Whom did you employ? A. Captain Douglas Taylor and his engineer assistant, a Mr. Horn. Mr. Horn was 1154
lieutenant commander in the Australian Royal Navy.

Q. Do we understand that he was a regular Navy officer or in the Naval Reserve? A. He was in the Naval Reserve.

Q. Did you employ them orally or in writing? A. I went down and spoke to them, but to make them official I thought I better do it in writing and I did so later on.

Q. I show you a letter and ask you if you wrote that letter? A. Yes, sir, I wrote it.

Mr. Murphy: I offer Captain Michelson's letter to Captain Douglas Taylor dated August 1, 1942 for identification.

It is marked Libellant's Exhibit 37 for identification. 1155

Q. Did you receive a reply from Captain Douglas Taylor? A. I did.

Q. Is that the reply, that letter of August 4th to you signed by Douglas Taylor (handing same to witness)? A. Yes, sir, that is the reply.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 38 for identification.

Q. Captain, before you left Melbourne did you take any steps to get permission to get on board the vessel when you got to Brisbane? A. Yes, sir.

1156 Q. Did you apply to anyone for a pass? A. Yes, sir, I went up and saw Colonel Plant.

Q. Did Colonel Plant give you a pass? A. Yes, sir, he did.

Q. Is that paper you hold there the pass that Colonel Plant gave you? A. Yes, sir, that is the one.

Mr. Murphy: I ask that this letter from Colonel Plant to the Superintendent, Army Transport Service, Base Section 3, Q P O 923 dated July 27, 1942 be marked for identification.

1157 It is marked Libellant's Exhibit 39 for identification.

Mr. Collins: Where was that given, at Melbourne?

The Witness: Yes, sir, at Melbourne before I left for Brisbane.

Q. Captain, when you got to Brisbane did you go down to the vessel and ask permission to go on board? A. Yes, sir.

Q. Did you have that pass with you, Libellant's Exhibit 39? A. Yes, sir.

Q. At that time was that red pencil writing on the lower third on that pass? A. No.

1158 Q. What occurred when you presented this pass at the vessel? A. I was turned back by an American sentry.

Q. What day was that? A. I couldn't be certain.

Q. Was it on the evening of the 29th when you got to Brisbane? A. No, sir.

Q. Was it the next morning, July 30th? A. Perhaps it was, I am not quite certain. I had heard some rumors in Brisbane and spoken to my agent about it. He told me that he did not believe that I would be permitted to go aboard.

Mr. Collins: I move to strike that out.

Q. All right, Captain, we will just go along slowly here and answer the questions. When you were turned back by the American sentry what did you do? A. I turned back.

Q. Where did you go? A. I went uptown.

Q. Where did you go? A. I went up to my agents, Dalgety.

Q. And then where did you go? A. I went down to Colonel Grimm.

Q. Who was Colonel Grimm so far as you knew at that time? A. Oh, I knew him at the time, I have known him a good many years.

Q. What was he? A. He was in charge of the Army Transport Service in Brisbane this time.

Q. By the way, you said Army Transport Service—was that United States Army Transport Service? A. Yes, sir. 1160

Q. Now, look at that red pencil writing on the lower third, and the date. Does that refresh your recollection as to when you saw Colonel Grimm? A. It shows that it was on July 30th that I did so.

Q. And that was after you had been turned back by the sentry at the vessel? A. Yes, sir.

Q. Was this writing put on that pass in your presence, were you there? A. Yes, sir, I was right there when he did it.

Q. Who wrote it? A. Colonel Grimm.

Q. After that what did you do with this pass? A. I went back to Mr. Smailes of Dalgety & Company and 1161 showed him that it had been approved by Colonel Grimm. It was too late to do anything more about it that same day.

Q. It was too late to do anything further about it that same day? A. Yes, sir.

Q. What did you do the next day—that would be July 31st? A. I can't be too certain but I believe I went back to the ship with the same pass and was turned back again.

Q. Do you remember when you first got on board the vessel? A. No, sir, I don't. It wasn't before I——

Q. I show you a paper and ask you what that is? A. I received this letter from Captain Williams.

Q. Was Captain Williams the man whom you mentioned before as being on board the *Portmar* before you left

1162 *Deposition of Axel Michelson—Direct.*

Darwin in connection with the salvage of the cargo? A. The very same.

Q. Now, when you had this pass did you present it on the vessel and did you get on board the vessel with this pass? A. Yes, sir.

Mr. Murphy: I offer this pass dated August 13, 1942 signed by J. P. Williams, Chief Salvage Officer, for identification.

It is marked Libellant's Exhibit 40 for identification.

1163

Q. Does that pass from Captain Williams refresh your recollection as to the date you first got on board the *Portmar*? A. Yes, sir, it does.

Q. And what date was it? A. The 13th of August.

Q. When you went on board the *Portmar* where was she lying? A. She was lying first at Tinkenba. Later on she moved up to South Brisbane, I forget the name, it was a milling company's wharf.

Q. But when you first went on board was she at Tinkenba? A. Yes, sir.

Q. Was anyone with you when you went on board? A. Yes, sir.

1164

Q. Who was with you? A. Captain Taylor.

Q. Was anyone else? A. No, sir.

Q. From that day forward did Captain Taylor make an examination of the ship? A. From that day and for several days subsequent both Captain Taylor and Mr. Horn were along with me down to the ship every day.

Q. Were you with them when they made their examination of the ship? A. Yes, sir, I was.

Q. While you were in Brisbane at this period did you receive any demand for salvage reward for services rendered to the *Portmar* by anybody? I show you a paper and ask you if that refreshes your recollection on that subject? A. Yes, sir, I did.

Q. What did you receive? A. I received a demand for 100,000 Australian pounds for salvage services that was sent me by my solicitors down in Melbourne.

Q. Are we to understand that your solicitors sent you a copy of a letter they had received? A. Yes, sir, that is correct.

Mr. Murphy: I offer for identification copy of letter addressed to Messrs. Malleson Stewart & Company, Melbourne, by H. F. E. Whitlam, Crown Solicitor, on the letterhead of the Commonwealth of Australia dated August 19, 1942. 1166

It is marked Libellant's Exhibit 41 for identification.

Q. Did you write to your solicitors, Messrs. Malleson Stewart & Company, a report of what you did and the examination you made of the *Portmar* at Brisbane during the period you have just mentioned? A. Yes, sir.

Q. I show you copies of two letters which you wrote to Messrs. Malleson Stewart & Company, one dated August 14, 1942 and one dated August 15, 1942, and ask you to refresh your recollection from those and with your recollection so refreshed I will ask you to describe the condition 1167 of the vessel as you found her.

Mr. Mount: Perhaps if we read that we may stipulate.

(Mr. Mount and Mr. Collins examine the letters).

Mr. Collins: I am willing to stipulate that if the master were questioned about it he would testify as far as the facts are concerned to the statements contained in his letters of August 14 and 15, 1942 to Malleson Stewart & Company and also to the opinions expressed in those letters.

Mr. Mount: We make the same stipulation in order to save time.

1168 Mr. Murphy: I offer for identification the master's letters of August 14, 1942 to be marked as Libellant's Exhibit 42 for identification, and letter of August 15, 1942 to be marked Libellant's Exhibit 43 for identification, both addressed to Malleson Stewart & Company of Melbourne.

Letter of August 14, 1942 is marked Libellant's Exhibit 42 for identification and letter of August 15, 1942 with its postscripts of August 15th and August 17, 1942 is marked Libellant's Exhibit 43 for identification.

1169 Q. Captain, did you subsequently receive a survey report from Captain Douglas Taylor and Mr. Horn? A. Yes, sir, I did.

Q. Did you receive a preliminary report before you received the final report? I show you a paper that may refresh your recollection. A. Yes, sir, I have seen this paper before. That was handed to me by Mr. Horn. I was pressing them for this report and they were so busy, they were working for both the Australians and the Americans, that they hadn't had time to sleep. They couldn't get any help, so it took them a long time before they got
1170 my report made out.

Q. Who handed you that paper you have in your hand? A. Mr. Horn himself.

Q. In whose handwriting it it? A. In Mr. Horn's.

Q. This paper then is to be considered a preliminary report by Mr. Horn? A. Well, that was a sketch of what he had seen at that time.

Q. As a matter of fact it is headed "Preliminary by Lieutenant Commander A. G. Horn written by himself"? A. Right.

Mr. Murphy: I offer this paper for identification and ask leave to substitute a photostat of it so that the master may retain it in his file. He wishes to do so.

1171

Mr. Mount: We have no objection to the introduction of this exhibit for identification or in evidence when offered as the preliminary report of Lieutenant Commander A. G. Horn, one of the owner's surveyors.

Mr. Collins: I concur.

Photostat copy of the preliminary report is marked Libellant's Exhibit 44 for identification.

Q. Captain, I show you what purports to be the final report of Captain Douglas Taylor and Mr. A. G. Horn, 1172
dated finally at the foot September 19, 1942. Is that the original final report that you received from Captain Taylor and Mr. Horn? A. Yes, sir, that is the one.

Mr. Murphy: On the same footing as the preliminary report I offer for identification original final survey report of Captain R. Douglas Taylor and Mr. A. G. Horn, surveyors representing Calmar Steamship Corporation. The survey started August 14, 1942, the report being dated at the foot September 19, 1942. It being understood that Mr. Mount and Mr. Collins make the same statement with respect to this as they did with regard to the pre- 1173
liminary report of Mr. A. G. Horn.

Final survey report is marked Libellant's Exhibit 45 for identification.

Q. After you got that final survey report of Mr. Taylor and Mr. Horn, which is now Exhibit 45 for identification, did you remain in Brisbane or did you go somewhere else? A. No, sir, I went back to Melbourne.

Q. Did you stop in Sydney on the way to Melbourne? A. Yes, sir, my solicitors in Melbourne——

Mr. Mount: That is after September 19th?

Mr. Murphy: Yes.

1174 Q. You were saying, Captain? A. I was saying that Malleson Stewart in Melbourne sent me a telegram asking me to meet Mr. Trumble in Sydney because they were going to have a meeting in Sydney concerning the Crown solicitor's letter.

Q. Was Mr. Tom Compson Trumble a member of the firm of Malleson Stewart & Company? A. Yes, sir.

Q. Did you meet him in Sydney? A. I met him but I did not meet him on the certain date stipulated because I could not get accommodations on the train.

1175 Q. But you finally got to Sydney and met him there? A. The day after, yes.

Q. While you were in Sydney did you hear any statement made by any representative of the United States Government regarding the cost of towing the *Portmar* from Port Darwin to Brisbane? A. Yes, sir.

Mr. Collins: I object until the representative of the United States Government is identified.

Q. Who did you hear make the statement, if you did hear anyone make the statement? A. Mr. Trumble told me first.

1176 Q. Oh, then you did not hear anyone make the statement? A. No, sir.

Q. Well, just for memorandum purposes for the moment, what did Mr. Trumble tell you—and for memorandum purposes I mean I am aware that it would be hearsay—what did Mr. Trumble tell you?

Mr. Collins: I object.

Mr. Mount: I object.

A. Mr. Trumble told me that Captain Williams had stated at a meeting the previous night that the cost of towing the *Portmar* to Brisbane was 32,000 Australian pounds.

Q. Did you ever hear after that that Captain Williams later reduced that figure? A. Yes, sir, I did.

Mr. Collins: Same objection.
Mr. Mount: Same objection.

Q. What did you hear? A. I heard that he had said that the real cost of towage had amounted only to 17,000 Australian pounds, maybe 17,500—it was in the vicinity of 17,000 Australian pounds.

Q. You say maybe 17,500? A. Possibly.

Q. Did you meet a Mr. John C. McHose while you were in Sydney? A. Yes, sir, I did.

Q. Who was Mr. McHose? A. Mr. McHose was the 1178
legal representative of the War Shipping Administration sent out to Australia from Washington.

Q. Did Mr. McHose have anything to do with Captain Williams' towage figures which you have just said were reported to you? A. Mr. McHose was present at the meeting where Captain Williams made those statements.

Q. Were you actually present in the room when Captain Williams made those statements? A. No, sir, I was not.

Q. And who was it that told you that Captain Williams had made the statement?

Mr. Collins: Objected to on the same ground.
Mr. Murphy: Understood. 1179

A. Mr. Trumble.

Q. What did you do after that meeting occurred? A. I went back to Melbourne.

Q. What did you do there? A. I awaited developments. I went back to Melbourne so I could stay close to my solicitors.

Q. Did you receive any notification of the fact that the United States of America requisitioned title to and possession of the *Portmar*? I show you a paper and ask you if that refreshes your recollection? A. Yes, sir, I heard about that. I am not quite certain that I have seen that paper before.

1180 Mr. Murphy: For the record I offer for identification original Western Union telegram addressed to Calmar Steamship Corporation by W. C. Peet, Jr., Secretary United States Maritime Commission, dated Washington, November 12, 1942 as Libellant's Exhibit 46 for identification.

It is so marked.

Mr. Murphy: And with it a copy of a certificate issued at Brisbane, Queensland, November 17, 1942 by H. A. Rettig, Superintendent Engineer United States War Shipping Administration, as Libellant's
1181 Exhibit 46a for identification. I am informed that Messrs. Malleson Stewart have advised Calmar Steamship Corporation in writing that they hold the original of this certificate in their file.

The certificate is marked Libellant's Exhibit 46a for identification.

Subject to check it is stipulated that title to and possession of the vessel *Portmar* were requisitioned by the United States acting by and through the United States War Shipping Administrator, effective as of 12 noon November 17, 1942 Eastern Australian Time at Brisbane, Queensland, Australia.

1182

Q. Now, Captain, did you wait at Melbourne for news of the *Portmar's* arrival at Sydney? A. Yes, sir.

Q. Did you make any preparation for a survey of the vessel after she got to Sydney? A. Yes, sir.

Q. Did you go to Sydney to make those arrangements? A. Yes, sir, I went to Sydney and I took my lawyer along with me.

Q. What kind of a survey did you want to have performed when the vessel got to Sydney? A. I wanted to have a survey of those parts of the ship that could not be surveyed while at Brisbane.

Q. Were those the parts of the ship that could not be examined while she was afloat? A. Yes, sir.

Q. Was it planned to put the *Portmar* on drydock at Sydney? A. Yes, sir.

Q. Did you hire any surveyors at Sydney to represent the *Portmar* and her owners? A. Yes, sir.

Q. Whom did you employ? A. Captain Howell and Captain Gibson.

Q. When did the *Portmar* arrive at Sydney? A. Monday, November 23rd.

Q. Who was Captain Howell and who was Captain Gibson? A. They were well-known surveyors in Sydney, surveyors to the American Bureau of Shipping, surveyors to 1184
Lloyd's and Veritas, surveyors to the British Corporation.

Mr. Mount: Was that one for hull and one for machinery?

The Witness: No, sir, they were both deck men and I told them if it was necessary to take an engineer along with them.

Q. When did you arrive at Sydney with Mr. Trumble? A. November 18th.

Q. And the vessel arrived November 23rd? A. That is right.

Q. Did the *Portmar* go on drydock as soon as she got to 1185
Sydney? A. No, sir.

Q. Why not? A. No space available.

Q. On what date did the *Portmar* go on drydock? A. (Referring to notebook) She docked at Dalgety's dock December 18th. I don't know when she went on drydock, I have forgotten.

Q. Was a survey held thereafter on the *Portmar*, a joint survey, at which the owners and underwriters of the *Portmar* and War Shipping Administration were represented? A. Yes, sir.

Q. When was that survey held? A. I cannot recollect.

Q. Was it after the *Portmar* went on drydock? A. Part of it was while she was on dry dock.

1186 Q. Was part of it held before she got on drydock? A. I believe so.

Q. Were you present at that survey? A. Yes, sir, I was present when she was surveyed in drydock.

Q. Were you present all through the examination made by those representatives of the various parties? A. No, sir.

Q. Do you know when work on the vessel was finished? A. No, sir, I do not.

Q. When did you leave Sydney and go back to Melbourne? A. Monday, January 11th.

1187 Q. At that time had they finished work on the *Portmar*? A. Nearly so. I believe there was a few things still remaining, trifles, a few things they were waiting for that they couldn't get before.

Q. On January 27, 1943 did you send a message to your owners? I hand you a cable and ask you if that refreshes your recollection? A. Yes, sir, I sent them that message.

Mr. Murphy: I offer the cable for identification.

It is marked Libellant's Exhibit 47 for identification.

1188 Q. I would like to go back, Captain, to just before you left Sydney. Before you left Sydney did you go on board the *Portmar*? A. Yes, sir.

Q. Did you look over the work that had been done on her? A. Yes, sir.

Q. Where was the *Portmar* then? A. She was in drydock in Woolwich.

Q. Is that near Sydney? A. Yes, sir.

Q. Is that the drydock of the Cockatoo Shipbuilding Company? A. That is one of their drydocks.

Q. How long was that before you left Sydney that you went on board the vessel? A. Not very long before I left.

Q. While you were on board the vessel did you go over the vessel and examine the work that had been done? A. Yes, sir.

Q. Did the work that had been done on the *Portmar* restore the vessel to the same condition in which she was prior to the first bombing attack in the Timor Sea on February 15, 1942?

Mr. Collins: I object to that.

Mr. Mount: I object to that as leading.

A. No, sir, it did not resemble anything of what Lloyd's would have asked for to put her back in class at all.

Mr. Collins: I move to strike out the answer as 1190
not responsive.

Q. Let me put it this way: From your own observation did the work that had been done on the *Portmar* up to the date on which you looked at her shortly before January 11th restore her to the same condition she was in before the first bombing attack in the Timor Sea on February 15, 1942? A. No, sir, it did not.

Q. What was the character of the work that had been done on her, from your own observation? A. I would say that it was some of the cheapest patchwork repair I have ever seen anywhere in the world. 1191

Q. Do you know what was paid for the work that was done on the *Portmar*? A. No, sir, I don't.

Q. Do you know whether the *Portmar* ever received a certificate of classification of 100-A1 British Lloyd's after the completion of that work in Sydney? A. No, sir, I don't, but I am——

Q. That is all right, that answers the question. After that it was on January 27, 1943 that you sent this cable to your owners which is Libellant's Exhibit 47 for identification, isn't that correct? A. Yes, sir.

Q. Now I show you a paper which purports to be a survey report bearing a heading date Sydney, 15th February, 1943. Did you see that paper or the original of it

1192 or a copy of it before you left Australia? A. I have never seen it before this minute.

Q. Have you ever seen a copy of this joint survey report before today? A. No, sir.

Mr. Mount: Your testimony was that you left Sydney before the work was entirely completed?

The Witness: Yes, sir.

Q. Now I will ask you to assume that this is a duplicate original of the survey that was made on the *Portmar* at
1193 Sydney and I will ask you to assume that this report contains the following statement: "The cost of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Darwin in February 1942 would amount to approximately £28,000 Australian currency, which figure includes the amounts to cover outstanding items mentioned in Clause 3 D below". Now, assuming that, do you agree with that conclusion? A. No, sir.

Mr. Murphy: I submit this document to counsel for the United States and counsel for the underwriters for their inspection.

1194 Q. When you left Sydney on January 11, 1943, was the *Portmar* still there—did you leave her behind you? A. I believe she was lying ready to go out. She was out in the stream and inaccessible.

Q. After you got back to Melbourne did you give testimony in a suit instituted by people who claimed salvage reward for services rendered to the *Portmar*? A. Yes, sir.

Q. Do you know when that suit was instituted? A. No, sir, I don't. I was told by my attorneys that I had to deposit 500 Australian pounds in Court before anything could be done. I went and drew a check for £500 and went with Mr. Trumble to deposit the check and I was told that there would be a hearing and I would have to be a witness shortly afterwards, which I was.

Q. Did you testify in those salvage suits? A. Yes, sir.

Q. Do you know the names of the parties who brought the suits? A. Yes, sir, it was the Salvage Corporation and I believe Captain Williams was named separately.

Q. Did the Commonwealth Salvage Board also bring a suit? A. Yes, sir.

Q. Did you testify with respect to both actions? A. Yes, sir.

Q. Did anyone else from your officers or crew testify as a witness while you were there? A. No, sir, there was nobody else there but myself. 1196

Q. On what date did you give your testimony in those suits? A. It seems to me it was in the first of March, I am fairly certain but I wouldn't swear to it.

Q. All right, the record will show. After your testimony was taken, did you cable your owners? A. Yes, sir.

Q. I show you a cable sent by you to Mr. Warley, President of Calmar Steamship Corporation, on March 3, 1943 and ask you if you sent that cable? A. Yes, sir.

Mr. Murphy: I offer the cable for identification.

It is marked Libellant's Exhibit 48 for identification.

The Witness: May I say one more word, outside of the record probably—it says in that telegram that all survey reports have been turned in to the solicitors. As far as I know this here last joint survey had not been turned in. In fact, I am almost certain it had not because I have never seen or heard anything about it. 1197

Q. Are we to understand that the statement in here "All survey reports now turned in to solicitors" did not include this so-called joint survey? A. No, it did not.

Q. Did you receive a reply to that cable, Libellant's Exhibit 48? A. I believe I did.

Q. I refresh your recollection by that paper (handing witness paper)? A. Yes, sir, I received that.

1198 *Deposition of Axel Michelson—Direct.*

Mr. Murphy: I offer the cable of Mr. H. W. Warley, President, Calmar Steamship Corporation, to Captain Michelson, dated March 3, 1943 for identification.

It is marked Libelant's Exhibit 49 for identification.

Q. When did you leave Australia for the United States? A. That was shortly after I received that telegram.

Q. Was it on the 6th of March, 1943? A. I believe so.

1199 Q. When did you arrive in New York, about? A. I arrived in San Francisco on the 22nd and I believe in New York the 1st of April.

Q. You arrived in San Francisco when? A. The 22nd of March and I believe in New York the 1st of April.

Q. Have you any notes that will show you? A. (Referring to notes.) I had them, but I cannot find them. I haven't got them with me.

Q. Captain, while you were in Australia, from the date of the bombing attack of February 19, 1942, until the day you left Australia and until you got back to New York, did Calmar Steamship Corporation pay your salary? A. Yes, sir.

1200 Q. Have you received your salary in full for that period? A. Yes, sir.

Q. While you were in Australia did you expend certain money for your personal expenses, traveling expenses and hotel bills, meals, railroad fares, while you were there? A. Yes, sir.

Q. Did you expend certain money for legal fees to Messrs. Malleson, Stewart & Company? A. Yes, sir.

Q. Did you expend money for consular expenses and for kindred matters? A. Yes, sir.

Q. Were all those moneys expended in the interests of the SS. *Portmar?* A. Yes, sir.

Q. Is this your expense account which you submitted to the Calmar Steamship Corporation after you got back to New York? A. That is my expense account, yes, sir.

Q. There appears herein a sheet of long, blue lined paper, a list of items. Is that in your own handwriting? A. Yes, sir.

Mr. Murphy: I offer the expense account for identification.

It is marked Libellant's Exhibit 50 for identification.

Mr. Mount: In not objecting to Libellant's Exhibit 50 for identification, we, of course, do not commit ourselves in any way as to the amounts or the propriety of the items. 1202

Mr. Collins: We take the same position.

Mr. Murphy: So understood. In response to notice to produce served by counsel for the underwriters, Messrs. Duncan & Mount, on July 23, 1945, we have assembled many documents from the files of Calmar Steamship Corporation and from the files of Captain Michelson. Many of these documents have been offered here for identification. The balance of them we have collected in an envelope and now submit them to Mr. Mount for his examination.

Q. Captain, a notice to produce served by counsel for the 1203 underwriters calls for production of all logs of the *Portmar* subsequent to December 10, 1941. We have already marked the smooth log and a photostat of the official log from February 15th on. The question has been asked whether there was any rough log of the *Portmar*. Was any rough log kept? A. No, sir.

Q. How were the concurrent entries made? A. From a log slate.

Mr. Mount: You are not offering as an exhibit for identification the master's testimony in the Melbourne suit?

Mr. Murphy: That is correct, I am not offering it. It has been submitted to you for examination and

you may offer it if you wish to do so. I do not regard it as applying to the matters in issue in this case.

Mr. Collins: We understand however that counsel for the respondents in both suits may refer to the master's testimony in connection with cross-examination.

Mr. Murphy: That is always open to counsel in cross-examining the witness. It is a statement made under oath on another occasion and obviously he may be cross-examined on it.

1205 Mr. Collins: I mean there is no question that that was his testimony?

Mr. Murphy: No question at all except the Captain may say that the stenographic report is not correct.

Mr. Mount: Yes, but it is true, isn't it, that the copy of the master's testimony and the other testimony in proceedings in the salvage suit at Melbourne were sent on to Calmar Steamship Corporation by their own attorneys in Melbourne?

Mr. Murphy: That is right.

1206 Mr. Collins: Does that conclude the master's direct?

Mr. Murphy: Your witness.

Adjourned to 10:30 A. M., August 2, 1945.

Met pursuant to adjournment, 10.30 A. M., August 2, 1945.

Present as before.

AXEL MICHELSON resumes the stand.

Cross examination by Mr. Mount:

Q. Captain Michelson, there are a few details that I would like to clear up as to the facts. In San Francisco

when the ship was chartered to the Maritime Commission who were your agents in San Francisco? A. We had our own office in San Francisco.

Q. Who were the agents for the Maritime Commission, if you remember? A. That I couldn't tell you, I don't know, sir.

Q. Now, in San Francisco you testified that you received secret orders and some other confidential documents from the Naval Control officer, was it? A. Yes, sir.

Q. Did you get those yourself from the Naval Control officer? A. Yes, sir. 1208

Q. And who told you to go there? That is was it your own office or was it the Maritime Commission's agents, if you remember? A. I believe I got the order direct from the Naval Control officer to come up there at a certain time. I am not absolutely certain but I believe it is so.

Q. You testified as to writing two letters to Calmar Steamship Corporation from Port Darwin which you said did not get through, and a third letter to your wife. Did the letter to your wife get through? A. No, sir, I testified that I wrote three letters from Suva in the Fiji Islands. Neither the letter to the wife nor the others got through—that is, I know the wife's did not, I am not quite certain about those, they tell me they never received them which I believe is so. 1209

Q. Yes—that was Suva? A. Yes, sir, that was Suva.

Q. And at Sydney you testified that you tried to send a message from Sydney by your agents and also by the American Consul? A. Yes, sir.

Q. And you said the American Consul said it was impossible to get any cable through? A. Yes, sir. When I say the American Consul I mean one of the Consuls or Vice Consuls because I merely saw the Consul General but I did not speak to him on any business.

Q. It was one of the American consular staff? A. Yes, sir.

Q. Did you try to send any letters from Sydney, if you remember? A. I sent a letter to the wife. I don't believe

1210 I sent any to the Company because they told me that the mail would not go through and they would never get it. As a matter of fact the wife never got hers either.

Q. Was I correct in understanding your statement yesterday to be that as to the routes you were to take beginning with Suva, they were directed by the Australian Naval Control officers but that as to disposition of the cargo, that was ordered by the American authorities, is that correct? A. That's right, that is the way it turned out.

Q. That is the way it was all the way through? A. Yes, sir.

1211 Q. And that was true with respect to the orders you got to sail from Port Darwin for Wyndham with the 2,000 drums of gasoline? A. Yes, sir.

Q. What kind of a port was Wyndham, if any? A. Not much of a port, it is in Western Australia. Western Australia is very much socialist and the Government owned a slaughter house and a meat-packing plant in Wyndham. It was also a little pearl fishing port, that was just about all.

Q. Was there any pier or dock there? A. Yes, sir.

Q. That you went alongside? A. Yes, sir.

Q. Does your logbook show the distance from Port Darwin to Wyndham? A. I am not quite certain.

1212 Q. Will you look and see, Captain? A. (Referring to logbook) It shows the distance from Darwin entrance to Wyndham entrance. There was a long river up, from the entrance and up to Wyndham, and that distance is not shown in the logbook when it comes to the inland navigation of that river.

Q. Well, does it show from the entrance to Port Darwin Harbor to the entrance to Wyndham Harbor? A. Yes, sir.

Q. And how much was that? A. 286 by the logbook.

Q. And who was it who gave the order to return from Wyndham? Was that Australian authorities or American authorities? A. That was understood and included in the orders I got before I left Darwin.

Q. Yes, I understand you got the orders before you left Darwin to come back? A. Yes, sir.

Q. And who was it gave you those orders? A. The British Naval Control, Australian.

Q. Now, when you were on the United States Cruiser *Houston* on the evening of February 14th you testified that Captain Rooks of the *Houston* explained the orders? A. Yes, sir.

Q. Did he tell you anything about the condition at Koepang? A. Yes, sir.

Q. Are you at liberty to state what that was? A. May I 1214
ask Mr. Murphy for permission to do so?

Q. Yes,

The Witness: Will it be all right if I do so (addressing Mr. Murphy)?

Mr. Murphy: I think that is all right as this is an impounded action. It may not be relevant or material but if Mr. Mount wants to know what Captain Rooks said to you I see no objection to your saying so.

Mr. Mount: I think the event is far enough back to be of no military danger to the Government at this time. 1215

The Witness: Gentlemen, I would not like to get in trouble for saying things I am not supposed to say but I do believe I am safe here to say so.

Q. We will not repeat it, Captain. A. All right. Captain Rooks he told us four merchant captains that it would be a very dangerous mission and he said "Gentlemen, Koepang Harbor is going to be a hot place. I don't even dare to take you into Koepang Harbor, I am going to take you up to the entrance and then, gentlemen, I am sorry to say I got to get out, you got to get in and do the best you can".

Q. Was it a matter of common knowledge in Darwin that an Empire Airways flying boat had been destroyed by

enemy action en route from Darwin to Koepang on January 29, 1942—was that generally talked about? A. I heard it spoken of. The details I never found out about.

Q. But it was talked about? A. It was spoken of, yes, sir.

Q. Was it also a matter of common knowledge that the port of Koepang had already been bombed by Japanese war planes? A. Yes, sir, that was known in Darwin. There were Dutch pilots that came up from Koepang and went up and told the military authorities in Darwin the
1217 exact conditions.

Q. Were those Dutch vessels which had fled from Koepang? A. No, they were planes.

Q. Following the air raid in Port Darwin Harbor on February 19th you testified that the chief officer reported a fire in No. 4 hold? A. Yes, sir.

Q. Was there also some fire in No. 5 reported to you or was it only in No. 4? A. I cannot be quite certain. There may have been a fire in No. 5 also but it seems to me that there was fire in No. 4 twice.

Q. Yes, that was your testimony. But that was gotten under control and put out, wasn't it? A. Yes, sir.

1218 Q. Now, will you look at the chart of Port Darwin Harbor, Libellant's Exhibit 4 for identification, and figure out how far it was from your anchorage of February 18th and 19th before the raid to the place of your anchorage off Channel Island?

Mr. Collins: May I suggest that the question is not quite clear. You mean the first anchorage off the Leper Colony or the point where he afterwards beached the vessel?

Mr. Mount: I said the anchorage off Channel Island. Then I am going to ask him from there on to the beach.

Mr. Collins: All right.

A. (Using dividers) About 4.4 miles.

Q. And then from that anchorage off Channel Island to the point where the *Portmar* stranded how much further would that be, considering the course you had to take, I mean how far did she travel? A. (Using dividers) About 1.2 or 1.3, I cannot be certain because it was kind of a round-about course—rather more than less.

Q. That is close enough. Now, the holes in the side of the *Portmar* following the Japanese attack on February 19th were so far as you know made by the exploding bombs? A. Yes, sir, and machine gun fire.

Q. And the damage to the bridge, was that done by the 1220
force of bomb explosion? A. Yes, sir, concussion. There was also there damage by machine gun fire.

Q. Without minimizing what you all went through, I understood your testimony to be that the damage which was done to the *Portmar* was done by gun fire and cannon fire and near misses of the bombs? A. That's right.

Q. That is, there was no actual direct hit on the ship of a bomb? A. No, sir.

Q. Before you and the crew left the *Portmar* following the stranding on February 19th did you order the fires in the engineroom put out? A. Yes, sir.

Q. That was to stop any danger of explosion of the 1221
boilers? A. Yes, sir.

Q. And my notes of your testimony are that you stated that before you left the vessel on the 19th of February you dropped the starboard anchor so that she had both the port and the starboard anchors out? A. I dropped the port anchor before the crew was taken off and I dropped the starboard anchor later on before I went to Darwin.

Q. Did you have any agents at Port Darwin? A. When I arrived at Port Darwin I was told by the Australian Naval Control that I better get an agent so I told them I did not know anything about Darwin at all, if they thought it was necessary that I get an agent I would get one, and they said I better go down to Captain Gregory. I did so, I went down to Captain Gregory and asked him if he would be my agent. He said he would. Later on when I got more acquainted

1222 *Deposition of Axel Michelson—Cross.*

with the officers of the American Army, especially Colonel Jones, also Colonel Robinson who was commanding officer at the time, they told me "Captain, you made a bad move when you went up and had Captain Gregory for an agent". I was a complete stranger, I did not know anything about the town, so I said "Colonel, how so?" he says "I don't like Captain Gregory and I am afraid that if he is going to stay your agent it won't be long before you won't like him either".

1223 Q. Now, Captain, you don't need to go any further on that. All I wanted was who was the agent. I understand that he turned out unsatisfactory. A. And may I say a little more? I went down to Captain Gregory then and told him that his agency of the ship was cancelled, I did not want him because I could not afford to have an agent that the American Army did not approve of.

Mr. Murphy: Will you ask him who was his agent after that?

Q. Did you have another agent after that? A. No, sir.

Mr. Murphy: You acted as your own agent?

The Witness: I did my own work.

1224

Q. And of course when you left San Francisco you did not have any agents appointed in Australian ports? A. No, sir.

Q. The same is true of Sydney—when you first arrived at Sydney did you need an agent there? A. Yes, sir.

Q. Did you pick one yourself? A. Yes, sir, I did after consulting men that knew a little bit about the town, such as pilots and the doctor that came aboard ship.

Q. And you chose Dalgety? A. I chose Dalgety.

Q. When you got to Brisbane you were there longer because you discharged some of your cargo? A. Yes, sir.

Q. And you had to make up your own mind there about choosing an agent, didn't you? A. Yes, sir.

Q. And you again chose Dalgety & Company? A. Yes, sir.

Q. And you did not need any lawyers until you got to Melbourne in March 1942? A. No, sir.

Q. Do you remember when the salvage of the cargo started? As I recall your testimony you said that on the evening of February 21st you were on Channel Island and you saw a launch coming down and it had Captain Williams and your own chief officer and Colonel Petterson? A. Yes, sir.

Q. That was February 21st. Do you know when the actual work of salvaging the cargo started? I suppose it was a day or so later? A. It took about two or maybe three days to get the gear together before they started. 1226

Q. Who was assisting Captain Williams and Captain Low—was it Mr. Low or Captain Low? A. I believe he was a captain also. He was a seafaring man.

Q. Who helped them? A. The American Army and the Australian Navy.

Q. Do you know how much of the cargo was out the last time you saw the *Portmar*? A. Very little.

Mr. Collins: The last time he saw the *Portmar*? 1227

Q. At Darwin, I should say. A. Yes, sir.

Q. In the camp of the United States Army where you testified you and the crew were confined, were there crews of any other vessels there under guard like your crew? A. Yes, sir, a good many.

Q. And when you took the train to Melbourne on March 10th were there other crews or members of other crews on the train with you? A. Yes, sir, not all of them but a few of them at least.

Q. Will you tell us in a little more detail about your attempts to get back to Darwin from Melbourne? Whom did you see about that? A. First of all my lawyers. Most of the attempts that I made to get back to Darwin were

1228 made through Malleson Stewart & Company because I realized that I had no chance at all. Malleson Stewart & Company, they knew everybody in town, they knew how to go about it. I was with Mr. Trumble of Malleson Stewart up to Colonel Plant's office once. That is the only time I believe that I was asking for transportation to Darwin myself. Colonel Plant let it be understood that there was no chance at all.

Mr. Collins: This may or may not be important. I move to strike out as a conclusion the statement
1229 that Colonel Plant led him to believe that there was no chance at all and suggest that he testify as to what Colonel Plant said.

Mr. Murphy: I wish to point out the witness did not say he was led to believe, that he testified directly to what Colonel Plant said.

(The answer of the witness is read by the stenographer.)

Mr. Murphy: I withdraw my comment. I misunderstood the witness' statement.

1230 Q. You worked through your lawyers on that point because you realized that you were a stranger in Australia? A. I knew that everybody that had anything to do with the case was trying to prevent me from getting back to Darwin and therefore I did not do too much about it direct because I knew that I would have no chance whatsoever.

Q. Were you in Melbourne from March 22nd until you left for Brisbane about July 29th or a day or so before? A. Yes, sir.

Q. During that time did you get any reports at all about the *Portmar* other than the news that you testified to yesterday that you heard she had been raised? A. Yes, sir, I did, I got news from her right along.

Q. Through what channels did that news come? A. Different channels, a good many different. All the Ameri-

can soldiers that came down from Darwin, American officers that came down from Darwin, stayed in the same hotel I did. They knew me by sight and they would talk to me if they met me on the street. Sailors that had their ships wrecked in Darwin at the same time and were held there a good deal longer than we were, they came down, they knew me by sight. Some of them came and saw me personally because they wanted my advice on different matters, how to get back to the States. It seems that I was the only captain that stayed in Darwin with his crew. All the others, they managed to get out somehow the same 1232
evening by plane to South Australia. I am not very friendly with any of the unions here in Australia and America but for some reason they thought it was all right that I stuck to my crew until I got them out of there and they knew me and they came and spoke to me. When I asked them questions about the thing that I was most concerned about they told me what they knew about it and I believe they told me the truth, in fact I know they did.

Q. Well, now, Captain Williams——

Mr. Murphy: Mr. Mount, will you allow me to suggest perhaps he has not quite finished as to his sources of information. Will you ask him if there 1233
was anyone else?

Q. I did not mean to interrupt you, Captain. Had you finished? A. Well, I can possibly think of more. There was a couple of missionaries and Roman Catholic chaplains that I had seen in the camp out there, they came to town also. Asking them about what they had seen they told me what they knew about it.

Q. Anybody else? A. That is all, I guess.

Q. What about seeing Captain Williams in March at Melbourne when he came down to Melbourne? A. Of course I always made the rounds of all the offices in Melbourne, such as Lloyd's. They were willing to tell me openly what they knew. It took a little time before they found out.

1234 There were Lloyd's surveyors in Melbourne also. There was Dalgety, my agents, they were known all over Australia and had sources of information that they could find out practically anything they wanted to know and get good information. They were willing to tell me what they knew concerning this case of mine.

Q. So you did keep in more or less touch with the situation? A. Yes, sir, I was in touch with the situation right along.

Q. Now, it was from Captain Williams, wasn't it, that
1235 you learned first that the vessel had been raised, when he was down in Melbourne? A. No, I had heard it from someone else before I heard it direct from Captain Williams. I believe I heard it the day before I met Captain Williams at the office of Owen Dixon.

Q. And then Captain Williams went back to Port Darwin, didn't he, after he told you about the raising of the boat? A. Yes, sir, I think he did.

Q. Do you happen to know whether he came down to Melbourne for some pumps? A. I found out later on that they had gotten two 14-inch pumps—I am not quite certain about this 14-inch—that they had gotten two 14-inch pumps
1236 and a donkey boiler and the Australian Government had helped them get them the 2500 miles more or less through the desert through Central Australia to Darwin.

Q. And along with the pumps didn't Captain Williams also get a diver at Melbourne? A. Captain Williams, he had before this time been engaged in salvage work, he had been very successful in getting five million pounds of gold out of a steamer, the *Niagara*, that had been torpedoed off the Coast of New Zealand. He had a little organization of his own or belonging to his company that had been held together since he had salved the gold for the British Government and it was one of those divers—there were two brothers Johnson that he had in his outfit—either one or both went with him to Darwin.

Q. They were his own organization? A. As near as I understood, yes, sir.

Mr. Collins: They went with him from Melbourne, do I understand? You said they went with him to Darwin—you mean they went with him from Melbourne to Darwin?

The Witness: I don't know where they had their headquarters. That may have been Adelaide for all I know. That would be a little more direct.

Q. Captain, when you speak of Lloyd's agent in various ports, that is the man who appoints surveyors and has surveys made in connection with damages to cargo and also 1238
takes care of classification requirements when repairs are made—that is what you mean by Lloyd's agent, isn't it? A. Yes, sir.

Q. You don't understand that that Lloyd's agent was an agent of the underwriters of Lloyd's? A. No, sir, I mean strictly the classification part of Lloyd's.

Q. The business part? A. Yes, sir.

Q. You testified yesterday that for the joint survey of the *Portmar* at Sydney you appointed Captain Howell and Captain Gibson who were surveyors for the American Bureau? A. Yes, sir, with the consent of my lawyers.

Q. Yes. Now, do you know how long they spent at Sydney in making that survey? Were you there during 1239
all the survey? A. Yes, sir, I believe I was.

Q. I wonder if you can help me with these signatures, Captain. On this document which Mr. Murphy has handed me, which is under the heading of Lloyd's Register of Shipping, Port of Sydney, dated February 15, 1943—these are just initials on the first page but coming over to the signatures, that is Captain Howell's signature (indicating)? A. Yes, sir.

Q. Now, what is this (indicating)? A. D. S. Carment.

Q. And he is described as Associate Naval Architect Cockatoo Docks & Engineering Company Pty., Limited? A. Yes, sir.

Q. Is that the ship repair concern that made the repairs? A. Yes, sir.

Q. And the *Portmar* was at their dock? A. Yes, sir.

Q. And in their drydock? A. Yes, sir.

Q. Now the signature James C. E. Erskine—he was surveyor to Lloyd's Register? A. Yes, sir.

Q. Can you make out that top signature? A. Yes, sir, that is McCowan, he was the principal surveyor to Lloyd's in all of Australasia. Those two men were Lloyd's men.

Q. Represented Lloyd's agent? A. Yes, sir.

Q. And Howell and Gibson represented you, your owners? A. Yes, sir.

1241 Mr. Mount: I offer for identification this signed copy of survey made at Sydney and dated the 15th of February 1943.

Mr. Murphy: No objection but I reserve the right to dispute the conclusions stated in this document.

Copy of survey is marked Underwriters Exhibit A for identification.

Q. You said you were present during this survey, Captain. Your testimony was that you arrived at Sydney November 18, 1942? A. Yes, sir.

Q. And that the *Portmar* was then docked at Dalgety's dock? A. Yes, sir.

1242 Q. And I was not quite sure when she went on drydock? A. No, sir.

Q. You don't remember that? A. No.

Q. Was it in November or December? A. December, the last part of it may have been finished in the month of January.

Q. And they were working on her through January, is that right? A. As far as my own surveyors are concerned, they were very, very busy. I was down in their offices every day and the Australian Navy would take them up—they were compass adjusters also. They were building a bunch of small craft. They had to take them up on trial trips and the survey had to be done piecemeal because they had so much other things to attend to that it could not be done

at once. About Lloyd's surveyors I don't know. I was down there but once. I saw Erskine down there and Carment, I saw him too down there, but I don't know what he had to do with the survey unless he was hired by someone else as a surveyor, probably the War Shipping Administration.

Q. To whom was the official logbook sent—and by official log I mean the log that had the matters dealing with the crew, a photostat copy of part of which is Libellant's Exhibit 34 for identification? A. The official log was in my keeping until I sent the crew home from Melbourne. I put 1244
the chief mate in charge of the crew going home. He was to pay the crew off when he arrived in the States. The official log contained all the accounts of the crew. I gave him the log along when he went back to the States on the *West Point*.

Q. The three hundred or so soldiers of the 148th Field Artillery Regiment were fully equipped for war, weren't they, so far as you could tell? A. I am not a soldier, sir, but I believe they were. I would not be a good judge of that.

Q. Can you express an estimate of how near Koepang you got on the trip from Port Darwin to Koepang when you turned back on February 16th? A. A little better than half 1245
—say three-fifths of the distance.

Q. Now, Captain, I am going to ask you one of those questions again about orders. Did any official tell you why the convoy was turned back? A. No, sir. I have no official information why we did turn back. I heard rumors but that's all.

Q. Have you any photograph of the vessel as she lay in Darwin on the beach? A. No, sir.

Q. Have you seen any photographs of her in that position? A. No, sir.

Q. Have you any photographs of the vessel in Sydney or in Brisbane? A. No, sir, we were not allowed to have any cameras aboard the ship. That was by the Navy and the Army. I was responsible for it that there was none aboard

1246 the ship. We had several aboard the ship, but they were always under seal.

Q. The thirty-ton derrick which was on your forward deck, was that injured in the bombing? A. I don't believe so.

Q. I understood you yesterday to say, Captain, that some officer of the United States Army had told you that the troops were all packed up and ready to go if there was an invasion, or was that something that you concluded yourself? A. No, sir, there was an officer told me that.

1247 Q. And I am going to ask you what rank he was? A. Colonel.

Q. Do you remember his name? A. Yes, sir. I don't like to identify him though unless you make me.

Q. I won't make you, Captain. Now, I want to ask you one or two things, Captain, about some testimony you gave down in the suit. Where did you give your testimony, in Melbourne? A. Yes, sir.

Q. Do you happen to know whether the suit was pending in Melbourne?

Mr. Murphy: I understand it was in Melbourne. The captain may not know what you mean by pending.

1248 A. It was pending in the High Court and the way I understand it the High Court was held alternately in Sydney and Melbourne.

Q. But you gave your testimony in Melbourne? A. I gave my testimony in Melbourne, yes, sir.

Q. You gave your testimony before a Notary—you were not actually in the courtroom, were you? A. Yes, sir.

Q. Oh, you were? A. It was not before the Court. There was a Commissioner appointed to take my deposition, but it was held in the courtroom.

Q. I see. And then shortly after you gave your testimony you came on home? A. Yes, sir.

Q. Now, in the copy of this testimony which I have been handed by Mr. Murphy in response to our notice to produce

I ask you to look on page 25, question and answer: "Now, as a sailor, tell me this: Unless somebody did something to that ship after you had left her would you expect the ship ultimately to become a total loss or not? A. She could have laid there for a year or even longer and it would not have made any difference one way or the other". Was that question asked you and was that your answer, Captain? A. Yes, I believe it was.

Q. Now on the next page, page 26, the question was asked you: "You say there was no risk of that ship breaking its back; that is your story, is it? A. There was no more 1250 chance of breaking her back, as you call it, as there was the first or second day she came in if she had laid there for a year". Was that the question asked you and was that your answer? A. Yes, I believe it was and I believe that was my answer.

Q. Now on the next page, 27, "Q. Did you understand that Captain Williams was a man who was an expert at salvage? A. I knew that he was somebody who had something to do with salvage. I did not know Captain Williams. Q. But you knew that he, this man, who was present, had something to do with salvage? A. Yes". That is correct, is it, Captain? A. I believe so.

Q. And on page 32 the question was asked you: "Would 1251 you have started with the aft batch? A. No; I would have raised the ship first. You said 'if you had the necessary crew and equipment'. Q. You would have raised the ship first? A. Yes." Were those questions asked and were those your answers? A. Yes, sir, I believe so.

Q. And then continuing on page 32 the question was asked you "How long would that have taken you? A. With the necessary equipment it would not have taken very long. Q. I am talking about doing it at Channel Island, not at Cockatoo Dock. First of all, what equipment would you have required? A. I would require pumps and steam; that would be the only thing required". Was that question asked and was that your answer? A. Yes, sir, I believe so.

Q. And then on page 33 the question was asked "But assuming you had been able to get the necessary pumps and steam in Darwin, how long would you have expected to take? A. You were the one who was supposing, I had all the necessary gear and equipment; I was not. Q. I am still supposing it. Supposing all those things, how long would it have taken to raise the ship? A. I would have to figure that out. I am not a professional salvager, but I knew it could be done". Were those questions asked and were those your answers? A. Yes, sir, I believe it was. It seems
1253 that this is shortened for both the questions and the answers but this is a long time ago and I can only say that——

Q. Well, you may remember yesterday, Captain, that Mr. Murphy agreed that this was the copy received from your attorneys in Melbourne? A. That's right. I have never seen this copy before.

Q. I never saw it either until a couple of days ago. A. It was not ready when I left Australia.

Q. Now, on pages 37 and 38, the bottom of page 37 the question there was asked you: "Did you find yourself able to make any examination of the state of the sea floor where the heel of the ship rested; was it silt or what was it? A. We sounded there a couple of times"—and then on page
1254 38 continuing: "Seemed to me to be stiff clay". Is that correct or is that the fact? A. Yes, sir, to the best of my knowledge.

Q. And on page 38 the question was asked you: "Let me put it this way: No one ever came back to the ship again except for the purpose of getting provisions out of the ship? A. That is right". That is correct, isn't it? A. No, it doesn't sound correct and I don't believe it is. That is what the record says.

Mr. Murphy: I suggest that the preceding question and answer should be read so that the meaning of that question and answer will be clear.

Q. What I mean is that after the crew left none of the crew came back except for provisions? A. No, sir, that's right. The only ones that came there for any other purpose was the chief mate and myself.

Q. The launch *Nevbet* that was on the *Portmar* was put over the side after the bombing on February 19th by your thirty-ton derrick? A. Yes, sir.

Q. And you said in this Melbourne testimony that that thirty-ton derrick could have handled any cargo forward, is that corerct? A. Yes, sir.

Q. You also testified, as you did here, that you had no 1256
conversations with Captain Williams about raising the ship. That is correct, is it? A. Yes, sir, the thing was never even hinted at.

Q. And nothing was said between you and Captain Low about raising the ship? A. No, sir, I believe not. I was not on such very good terms with any of those gentlemen. They tried to keep away from me.

Q. In your testimony in Melbourne on page 13 referring to the holes in the side of the ship the question was asked you: "Whereabouts were the greater number of these holes? A. In Nos. 4 and 5 holds and in the engineroom.

Q. About how many of them were plugged? A. I do not 1257
know for certain but about fifty of them". That is correct, isn't it? A. No, sir.

Q. How would you vary that testimony? A. I had then been at the survey of the ship up in Brisbane. I had counted every one of those holes and had to go and get a piece of chalk so I could mark them so I wouldn't count them twice. It was very difficult to get the chalk but I got it and I marked the holes and counted them and there was 91 holes and I did not tell the High Court in Melbourne anything different than that.

Q. No, this was how many had been plugged before you left Darwin (pointing out to the witness the question in the record)? A. Oh, I missed the word "plugged" there.

1258 Q. You can read before this if you want to pick up the story. A. Yes, sir.

Q. That is correct, as it is stated in the testimony? A. I believe it to be correct, yes, sir.

Cross examination by Mr. Collins:

Q. Captain, when you moved from your second anchored position, which was opposite the Leper Colony on Channel Island as I understand it from your testimony on direct, you tried to make some point picked out by you and the
1259 mate, is that correct? A. Yes, sir.

Q. And were you familiar with those waters there? A. No, sir, never been there before.

Q. And about all you could do was to watch the water over the side to get some idea of the depth, is that correct? A. Yes, sir.

Q. And you did bring up pretty close to the point at which you were aiming, is that right? A. Yes, sir.

Q. Your official log, Exhibit 34 for identification, for February 19th states the following: "With both compasses destroyed by machine gun fire we did not succeed in putting the ship in the exact spot we had picked for her and
1260 she grounded a little to one side of it at 2.12 P. M.". That is correct, isn't it? A. Yes, sir.

Q. In other words, what you did was to beach the vessel but not at the precise spot that you picked but one very close to it, is that about it? A. Yes, sir.

Q. Now, after the attacks by bombers to which you were subjected on the voyage to Koepang you immediately concluded that the ship had been damaged from stem to stern, did you not? A. I concluded that she had been weakened in her structure.

Q. And you made the entry in the deck log for February 16th: "Vessel weakened in her entire structure from fore to aft"? A. Yes.

Q. That was your understanding at the time? A. Yes, sir.

Q. That was based on rather a superficial examination, was it not? A. Well, we did not have time for no exhaustive survey.

Q. You could not really tell whether the vessel had been weakened in her entire structure without a survey of possible damage, is that correct? A. Yes, you could.

Q. Your conclusion that she had been weakened in her entire structure at that time was based on what? A. The entire absence of vibrations in the ship when she was run full speed. It was based also on what the chief engineer and the chief mate told me, paint and scale and rust had 1262
dropped out of all the joints between the frames and the plate.

Q. After the return of the vessel to Port Darwin did you attempt to have any survey then made of the damage? A. No, when you are watching for the Japanese to come in you don't have time for no surveys to be made.

Q. The first thing you did, I understand, was to go to Port Darwin and endeavor to note a protest, is that correct? A. The first thing I did was to go to Port Darwin and attempt to note a protest but I was told by very good authority, the British authorities of the town, that there was no official left in Darwin to note such a protest. They 1263
even told me that the administrator of the town had left in such a hurry that he had forgotten to take his wife along with him.

Q. At any rate, did you make any attempt to find anybody qualified to examine the ship at that time? A. No, sir, I did not.

Q. Your conclusion after you had arrived at Port Darwin was that the condition of the vessel was then hopeless, is that correct? A. I don't know exactly what you mean by hopeless. If you mean that salvage was in my opinion next to impossible you are right.

Q. Did you tell Captain Williams on February 24th that you were going to give the underwriters notice of abandonment? A. No, sir, I did not. Captain Williams was after

me several times and wanted to know if I was going to abandon the vessel. I found out afterwards that Captain Williams did not even know the difference between leaving the ship and abandoning it to the underwriters.

Q. Well, will you just listen to this testimony which according to this copy of the transcript you gave in the salvage suit at Melbourne, beginning at the bottom of page 18: "During that day, the 24th—24th of February—did Captain Williams come aboard? A. Yes. Q. Was anybody with him? A. Colonel Petterson of the U. S. A.
1265 Army. Q. Did you have any conversation with Captain Williams during the day? A. Yes, once. Q. What did you say to him and what did he say to you? A. I told him that I was anxious to get in touch with a public official so that I could note a protest and I was anxious to get in touch with my owners. I believe I also asked him where he lived. Q. Did you ask him where you could go to protest? A. I am not quite certain if they were the words. They were to that effect anyway. Q. Did you ask him whether he could help you to do these things? A. Not help me to do it. Q. To tell you where? A. To tell me where. Q. What did he say? A. He told me as near as I remember that there were no officials left in Darwin, that
1266 they had all vacated the town. Q. What did you say? A. I told him that it was of much importance to me to get something done about it and let the owners know what had happened because I had been unable to send a telegram from Darwin. I told him that I was going to tell my owners to give notice of abandonment to the insurers because I thought the ship was a constructive total loss. Q. What did he say? A. He said 'Do you mean to say that you are abandoning the ship' or something very nearly like it. Q. What answer did you make to that? A. I do not know that I made any answer because it struck me as strange that he did not understand what I meant when I told him that I was going to give notice of abandonment. It struck me that Captain Williams had taken it that I was

going to tell my owners that I was abandoning the ship." Were those questions asked at that time and did you give those answers? A. Yes, sir, I believe they were and I believe the answers are perhaps nearly what I said. I don't believe I used those words because I am not a lawyer and things like constructive total loss I have got to look it up in a book before I know what it means.

Q. Will you dispute the accuracy of this testimony as read to you from this transcript? A. Yes, sir.

Q. In what respect? Just your use of the word "constructive total loss", is that it? A. I have read that testi- 1268
mony through and I know that questions asked me and answers given by me are totally missing in that.

Q. Did you at any rate inform Captain Williams in this conversation on February 24th that you were anxious to send a cable to your owners and inform them that they should give notice to the underwriters of the abandonment for the purposes of the insurance? A. I spoke to him about getting in touch with my owners and sending a telegram to my owners. The rest of it I doubt whether I discussed with Captain Williams or not. I doubt whether I used those words there or not.

Q. I think you testified that you knew that Captain 1269
Williams had something to do with salvage? A. There was a Major Brenn that was appointed by Lieutenant Colonel Jones to take care of all cargo. He came aboard the ship to get an idea of how the cargo was stowed before we docked at Darwin jetty and he told me that the Australian Navy had sent down to Adelaide for a salvor to come up and raise some submarines that they had sunk outside Darwin and in the vicinity of Darwin. I found out later and afterwards that Captain Williams was the man. I found out also that there was no submarines found, it was just rock ledges that they had taken to be sunken submarines and Captain Williams was walking around Darwin with nothing to do.

Q. Well, in any event you did learn while you were still at Darwin that Captain Williams was an experienced man on salvage, is that true? A. About his experience I knew absolutely nothing. I knew that there was such a man called up and I learned afterwards that that was Captain Williams. I had no idea at the time that he was the man that had been connected with the salvage of the *Niagara*.

Q. Did you have any conversation with Colonel Petterson about Captain Williams, who and what he was, when
1271 you met Colonel Petterson? A. I don't recall. I spoke to Colonel Petterson maybe once or twice after this thing had happened.

Q. You knew that Captain Williams was salvaging cargo, of course? A. Yes sir, I knew he was attempting to or had been asked to do it.

Q. Well, as a matter of fact you knew he was doing it, didn't you, while you were still at Port Darwin? A. Yes sir, they were doing it.

Q. You never, as I understand it, at any time asked Captain Williams as to the possibility of his salvaging the vessel? A. No, sir, I did not.

Q. And your testimony is that in no conversation with
1272 Captain Williams at any time did you even discuss the raising of the vessel, is that correct? A. I don't believe I did.

Q. In fact you thought that the vessel was finished and raising was impossible, did you not? A. I thought the vessel was finished but I never thought that it was impossible to raise her. I put it on the record as soon as I got to Melbourne that the easiest thing in the world was to raise the ship if you had the necessary equipment.

Q. Did you not tell Captain Williams in one of your conversations with him at Port Darwin that the *Portmar's* back was broken and that she could not be raised? A. No, sir, I never did.

Q. Did you not also tell him that you would not allow your chief mate to work with Captain Williams because the ship was finished? A. That is a direct lie. In the presence of Colonel Petterson and Captain Williams I called Mr. Bullock up—you will later on have him for a witness—I told Mr. Bullock to do anything in his power to help Captain Williams with all the gear and material that he could find in the ship, to get the guns out of the ship and help the American Army as much as possible.

Q. At any rate, you personally did not even think of raising the vessel, is that correct? A. Personally I could 1274
not do anything. It would take pumps and steam to do it with.

Mr. Collins: I move to strike out the answer as not responsive.

Q. (Repeated) At any rate, you personally did not even think of raising the vessel, is that correct? A. I discussed with the mate and the chief engineer every day the possibilities of raising the ship. We were all three of one opinion that it would not take much to raise her.

Q. Were you asked this question and did you give this answer, at the bottom of page 21 of the testimony in the 1275
salvage suit: "In those circumstances did you think it was worthwhile raising her? A. I do not know that I ever weighed whether it would be worth it or not because the way it looked to me was as if everybody was going to leave Darwin, I did not think anybody was going to bother with anything sunk in the Bay". Did you give that testimony? A. I believe I did.

Q. Did you make any inquiries as to whether the necessary pumping equipment and a donkey boiler could be obtained at Melbourne or any other port? A. By the time I got to Melbourne or shortly afterwards I heard that Captain Williams had gotten the pumps from the Australian Government who were transporting them through the

desert. There were none in Darwin at the time and none within long distances of Darwin.

Q. Did you make any inquiries was my question? A. I did.

Q. Of whom? A. The Australian naval authorities, anybody along the waterfront that knew anything about ships at all.

Q. What Australian naval authorities, who were they? A. There was Lieutenant Gollar, he was the man I knew the best. He was Naval Control officer of Darwin. There
1277 was a couple of commanders there, one Rairden, I believe, and another one I can't think of his name now—they told me that there was no equipment of any kind at Darwin.

Q. When did you first hear of any attempt being made to raise the ship? A. Possibly a day or two before I heard that she was raised.

Q. When was that? A. I believe that was on the 13th of April. I may be wrong as to the date.

Q. I have forgotten whether you testified whether you were or were not furnished with a copy of the charter agreement at San Francisco before commencing this voyage? A. Yes, sir, I was.

Q. You had a copy of the charter agreement? A. I had
1278 one, yes, sir.

Q. When did you first give a statement to Mr. Murphy or Mr. Campbell as to the facts in this case?

Mr. Murphy: I object to that as immaterial and not proper cross-examination. Statements given to counsel are in preparation for trial and not admissible. He should not be examined with regard to it.

Mr. Collins: I am not calling for the statements. I think it is proper cross-examination in view of the amendments to the libel which were made upon the examination of this witness.

A. Will you state that question to me a little more clearly, please?

Q. (Repeated) When did you first give a statement to Mr. Murphy or Mr. Campbell as to the facts in this case? A. That was shortly after I arrived in New York from Australia. I don't know the date. It must have been in April 1943.

Q. And you told them all the facts then as you recalled them, I presume? A. I believe I told them everything they asked about. I know that I told them the facts as near as I knew them.

Q. You told them all the orders which you had received from various officials at the various ports all along the 1280
route? A. I believe so, yes, sir.

Q. From whom did you get your orders to proceed in this convoy to Koepang? A. From the Australian Naval Control aboard the U. S. Cruiser *Houston*.

Q. They were by the Australian Naval Control officer and not Captain Rooks of the Houston? A. I believe Lieutenant Gollar was the man that handed each of us four masters a copy of the orders. Afterwards Captain Rooks explained those orders and went through them from one end to the other with us sitting around his table.

Q. Did you protest against taking this voyage? A. No, sir, I did not.

Q. I suppose it was quite useless, is that your under- 1281
standing? A. When I get an order from proper authorities with the sanction and understanding and knowledge of American authorities who are present then I don't protest in time of war when I believe it is for the sake of prosecuting the war.

Q. I quite understand that. I just want your plain statement in the matter. You were ordered by those whom you considered competent military authorities to go on this voyage to Koepang and there was nothing else for you to do, is that correct? A. No, sir.

Q. I say there was nothing else for you to do? A. Well, I wouldn't say there was nothing else for me to do. If I said "Gentlemen, I am not going to take your ship, I believe it is all foolishness" then they probably would have——

Q. Put you in jail? A. Done something to me and put another man in my place, and a better man.

Q. You saw the vessel after she had been towed to Brisbane, of course? A. Yes, sir.

Q. You went all over her? A. Yes, sir.

Q. She had been looted while she was at Port Darwin after the bombing of practically everything that was loose on her, is that correct? A. That's right, sir. I saw some of the looting going on.

Q. Did you make any attempt while you were at Port
1283 Darwin to have a watchman or guard put aboard the ship? A. Yes, sir, I did in this way, that I went to the Australian Naval Control and told them everything about it and I told them it was up to them to put a guard aboard the ship and shoot anyone that tried to steal stuff in the future.

Q. Who was looting her, Captain? A. Captain Williams' gang, the Australian Navy.

Q. Do you mean to say the Australian Navy people themselves were stripping this ship? A. Yes, sir, I mean exactly that.

Q. Did you see them? A. Yes, sir, I did. The chief mate of mine, he was before we left Darwin aboard an
1284 Australian corvette where they served him breakfast out of the ice chest that they had taken out of our ship. There is lots of things, gentlemen, that would have appeared in that protest and in the testimony from Melbourne if it had not been for the sake of the war going on. The powers that be they have evidently thought that it would be best to keep it out of the evidence. Maybe it is, I don't know, that is not for me to say.

Q. Well, this record is going to be long enough, Captain, so just suppose you answer my questions. There won't be very many more. By the way, those fifty holes in the hull which you told Mr. Mount had been plugged before you left Port Darwin, they were plugged by the ship's crew, were they not? A. Yes, sir.

Q. And the largest of all the holes was only about 8 by 4 inches, was that your recollection? A. I don't believe,

sir, that I ever measured any of them exactly but there was holes of about that dimension. I don't believe I have ever said eight inches anyway. It seems to me that I counted the largest hole about seven inches.

Q. Were they mostly made by the aerial gun fire? A. Yes, sir.

Q. Who was the American Consul with whom you say you talked at Sydney after your arrival there on December 30, 1942? A. I couldn't tell you his name. There were three or four Consuls in the office, or Vice Consuls. I spoke to all of them. They were what they pretended to be. 1286

Q. Well, I mean it was either the Consul or one of the Vice Consuls, is that correct? A. Yes, sir.

Q. It is my understanding that from the time you arrived in Australia all the orders you received with reference to the cargo you got from the American military authorities? A. Yes, sir.

Q. And your orders as to where you should go from one port to another were from the naval authorities? A. Australian or British naval authorities, yes, sir.

Q. At Brisbane whom did you see at the American Consulate? A. I saw the American Consul himself, Mr. Ragland.

Q. That was in regard to trying to get a message to your owners, is that it? A. Yes, sir. 1287

Q. Did you consult any American Consul or representative of an American Consul with reference to joining this convoy to Koepang? A. There was no chance to do so.

Q. There were none around? A. There was no American consular representatives in Darwin.

Q. Well, were there any stationed there ordinarily? A. No, sir, Darwin was only a little pearl fishing town.

Q. I meant to ask you one further detail about your anchorage at Port Darwin at the time of the bombing. Were there other ships anchored near you? A. Yes, sir.

Q. How near were they to you? A. May I take a look at one of my notebooks?

Q. Certainly. A. (Referring to notebook) It says here that from the first anchorage in Port Darwin after we came

back from Koepang as is marked on that chart there the *Meiggs* which was——

Mr. Murphy: Indicating "*Portmar* anchored 12,55 P M February 18, 1942" on the chart.

A. (Continuing) it says that the *Meiggs,* which was an American Army transport, bore 257 true about 2,000 feet, that the American ship *Mauna Loa* of the Matson Line bore 220 true about 2,300 feet and the Australian motorship *Tulagi* bore 174 about 1,900 feet.

1289 Q. Were there any vessels anchored near you off Channel Island or in the place where you finally beached the vessel? A. No, sir.

Q. What was the position of Colonel Jones in the Army there at Port Darwin, if you know? Was he commander of this Field Artillery Regiment, or one of them? A. Mr. Collins, I don't exactly know.

Q. Well; if you don't know that is all right. I can check up myself as a matter of fact, and will. Do you know who at Port Darwin was the highest ranking officer in the United States Army Transport Service? A. No, sir, I don't. He must have been aboard the transport *Meiggs.*

1290 Q. What was the position of Colonel Plant, whom you mentioned? A. I wouldn't like to make any mistake and I wouldn't like to make any statements about things I don't know exactly—he was a colonel in the American Army in charge of all Board of Transport in Australia, I believe.

Q. Was he at Port Darwin during your stay there? A. No, sir.

Q. You first met him at Melbourne? A. Yes, sir.

Mr. Collins: I have a few more questions, not a great number. I suggest we adjourn for lunch.

Recess taken to 2 P M.

AFTER RECESS, 2 P. M.

Present as before.

AXEL MICHELSON resumes the stand.

Cross examination continued by Mr. Collins:

Q. Captain, to whom did you say you applied in the Australian Royal Navy to have the ship guarded from looting or other damage after you got to Port Darwin? A. It was a commander in the Royal Australian Navy. It was the same fellow that signed the receipt that we have seen here. I am not certain about his name. 1292

Q. That is the receipt for the documents that you turned in? A. Yes.

Mr. Collins: Referring to Libellant's Exhibit 5 for identification.

Q. At any rate, nobody was put aboard the ship, is that correct? A. No, sir, not to my knowledge.

Q. You spent two or three nights there yourself, did you not? A. Yes, sir. 1293

Q. Of course there was no looting going on at that time? A. I wouldn't be too certain of that. I found in my quarters that they had even used the top maul trying to get into the safe. They had knocked the lock off, ruined the combination, the top maul was lying alongside the safe the next time I saw it.

Q. Were there any other officers on board these nights you spent on the ship? A. One night the chief mate was there and I believe also the chief engineer.

Q. Did I understand you to say that the looting was done partly by Captain Williams' men? A. Yes, sir, that is what I said.

Q. Did you report that to your solicitors, Messrs. Malleson Stewart & Company, in connection with the salvage suit? A. Yes, sir.

Q. You did not attend the trial, I take it, the trial of the salvage suit—or did you? A. No, sir, they took a deposition just like they are doing now and that is all I knew of the salvage suit.

Q. You don't know whether the defense was asserted to the claim of the salvage people that they looted the ship, do you? A. No, sir, I don't.

1295 Q. At any rate, there is no question that a great deal of the ship's equipment was taken? A. No, sir, no doubt whatever.

Q. You saw the results of that when you visited the ship in Brisbane? A. Yes, sir.

Q. Will you tell us to what extent the ship had been stripped of equipment and so forth? A. Yes, sir. All the dry stores, steward's stores that were above water were taken. The machine shop was looted of everything in it. We had a fine machine shop, we used to do as much of our own engine repairs as possible and the company had fitted us up a fine machine shop with all kinds of tools and drills, lathes, wrenches—practically everything was taken that could be

1296 moved. They took also all the meats and boatswain's stores such as several brand new manila lines that we had never used, all the spare rigging we had, all the spare rope we had, all the spare canvas we had, all the paint, all the tools we had, they took everything out of the hospital, they looted the wireless shack and demolished the radio bearing instruments we had, they took all my books, all the charts belonging to the ship, all navigational equipment, all the clocks—in fact, Mr. Collins, they took everything that could be moved, they didn't overlook anything that I saw.

Q. I take it then in your opinion as you saw the vessel at Brisbane, which was presumably her condition at the end of this looting at Port Darwin, she was quite unfit for service as a merchant ship? A. Absolutely.

Q. In fact, she was probably unfit for service as a ship of any kind, is that correct? A. As a ship, yes, I wouldn't say as a storehouse or as a hulk.

Q. I say as a ship? A. Yes, sir, as a ship.

Q. All navigational equipment had been removed or destroyed? A. Yes, sir. Also they had taken everything in the steward's department.

Q. Radio equipment had either been removed or destroyed? A. Yes, sir.

Q. All parts were gone? A. Yes, sir. I saw once coming out to the ship I saw one of our brand new mooring 1298
lines being passed over the side into an Australian craft of some kind. As soon as they saw the launch coming they made off. I don't know who they were. The naval officer in Darwin that I asked to have the ship guarded, he says "Captain, what would you do about it?" so I said "I would hang just about a dozen of the first ones caught doing it, then it would stop itself". They looted the slop chest, all the tobacco, all the cigarettes.

Q. After the bombings in the Timor Sea were any bilge soundings taken? A. Yes, sir.

Q. Did you have a bilge sounding book? A. Yes, sir.

Q. That you no longer have? A. No, sir.

Q. But there was no unusual amount of water in the 1299
bilges, I understand? A. No, sir, there was not.

Q. How high did the water get in the holds after the bombings at Port Darwin? A. I don't know for certain because I was on the bridge at all times and how high it really got I don't know because then we took her down to the place where she finally was left and the water kept increasing until she sank.

Q. When you spoke of the list that the vessel had, was that list based on any clinometer or just your judgment? A. No, sir, the clinometer, the two we had, they were each on a compass, the standard compass and the steering compass, and they were gone with the compass. That is just my judgment.

1300 Q. So long as you were going back to the vessel in her last anchorage or the place of her beaching off Channel Island there were no Japanese air raids down there at that time, were there? A. Yes, there were Japanese air raids every day over Darwin and down over the camp. They even dropped a bomb now and then in the harbor, but there was no regular air raid over Darwin Harbor any more because there was nothing more to be had.

Q. How far was the position of your ship off Channel Island from the town of Darwin itself? A. I believe between six and seven miles.

1301 Q. How many times in all—this is probably in your direct testimony but just let me summarize it—how many times in all did you go back to the *Portmar* before you finally left for Melbourne? A. I cannot be absolutely certain. I had a notebook that I have lost. I took down what happened day by day.

Q. What is the notebook to which you have been referring during your testimony here? A. Oh, that is all the notes that I have gotten, partly from what the chief mate and other members of the crew had noted down and partly from what I remember, so I wouldn't forget it.

1302 Q. You mean it was written up after the occurrences, is that it? A. Yes, sir.

Q. Just what did you mean when you said that when you and your crew finally left Port Darwin you were put on the train almost forcibly? A. I meant that we had no choice in the matter. They had the transportation for us, they came down and ordered us to put our few belongings we had, which wasn't very much, on the trucks. The men that had guarded us in camp, they were there and saw that we went aboard the trucks and there were soldiers boarded every truck with us and took us down to the railroad. When we came down there there was Colonel LaRue, an Australian liaison officer, Captain Degrucia, and a couple of the lieutenants from the 147th Field Artillery—I don't know their names.

Q. I take it that the A y and military authorities were in pretty complete charge at Port Darwin from the time your vessel arrived there and the Japanese attack occurred, is that right? A. Were in complete charge?

Q. Yes. A. Yes, sir, absolutely.

Q. You said that in your attempts to get back to Port Darwin from Melbourne you once went to Colonel Plant's office? A. Yes, sir.

Q. And your testimony was that Plant let it be understood that there was no chance of your going back. Just what did he say? A. I don't remember, I don't remember 1304
his exact words.

Q. Did you talk to him? A. Yes, sir.

Q. The Army did in fact take over the possession and complete control of your ship, did they not? A. Yes, sir.

Q. Was that before or after you left Darwin? A. That was after I left Darwin.

Q. At what time is it your understanding they did take over possession and complete control? A. We went into this yesterday and I believe it was said that it was on the 17th of August. I am not certain of the date though.

Mr. Murphy: 17th of November.

Mr. Collins: I object to counsel interpolating any 1305
suggestion. I am not talking about the requisition of title.

Mr. Murphy: I submit that what the captain said was perfectly and apparently in error and if Mr. Collins wishes to have errors in this record so as to play on them let him say so.

Mr. Collins: I submit that I am entitled to cross examine this witness without interruption from counsel. I submit my question is perfectly clear and it has nothing to do with the requisition of title.

Mr. Murphy: All right. Do you wish the captain's answer to stand as the 17th of August?

Mr. Collins: Yes.

Mr. Murphy: All right, I will re-examine him.

1306 Q. Did you meet an American Army official in Australia named Barnes? A. No, sir, not that I know of.

Q. You don't know who he was? A. No, sir.

Q. Do you not know that even in the early part of May 1942 this vessel and everything in connection with her were under the orders of Colonel Plant, Chief of the Water Section of the Army Transport Service? A. I did not know anything about the understanding or agreement between the American Army officials and the Australian Navy and Captain Williams. I did not know anything certain at all.

1307 Q. Do you know that it was the United States Army officials who arranged with the Commonwealth Salvage Board of Australia for the towage of the *Portmar* from Port Darwin to Brisbane? A. Yes, sir, I gathered that much.

Q. Those arrangements were made in early May 1942, isn't that correct? A. I don't know, sir.

Q. Did you state to Colonel Plant while you were in Melbourne that you had advised the Calmar Steamship Corporation that the *Portmar* was not worth salvaging? A. Perhaps I did. Once or twice I was up to see Colonel Plant in the company of my solicitors.

1308 Q. Was that before or after the vessel had been raised? A. I don't know for certain.

Q. It is my understanding from what you told me before the luncheon recess that you were first informed concerning Captain Williams' qualifications as a salvage man when you talked with an American Army Major Brenn? A. That's right.

Q. About when was that? A. That was while Brenn, he came aboard to prepare for the discharge of the cargo when first we came to Darwin.

Q. And from what Brenn told you then Captain Williams had had extensive experience in salvaging vessels, is that correct? A. He never said no such thing to me. He said that they had sent for a fellow that had come up from the South Coast.

Q. To salvage submarines? A. To salvage submarines, yes, sir.

Q. But you knew he had been considered capable of salvaging submarines? A. I never gave it a thought.

Q. And you never made any inquiries whether he could salvage the *Portmar*? A. No, sir, I was not interested whatsoever.

Q. In fact you thought that time that the *Portmar* could not be salvaged?

Mr. Murphy: Now just a minute. What does counsel mean by "at that time". First he has the captain talking about when he first came to Darwin with the cargo—what do you mean by "that time"? 1310

Mr. Collins: At the time of his conversation with Major Brenn.

Mr. Murphy: That means when he first got there with his cargo before the *Portmar* had been hurt at all.

The Witness: Yes, sir.

Q. Oh, this was before the *Portmar* had been damaged? A. Yes, sir.

Mr. Murphy: I do not mind cross examination but we are getting nowhere with confusion. 1311

Mr. Collins: All right, you can comment before the Court. The Court is absent at the moment. I am not trying to mislead the witness. I probably misunderstood him. My understanding was that he was referring to the conversation with Major Brenn when the cargo was being salvaged.

The Witness: No, sir, this was before anything had happened to the *Portmar* at all and before we had taken any cargo out of the *Portmar* when we first arrived at Darwin.

Q. Even then you were informed by Major Brenn that Captain Williams had been employed to salvage submarines,

is that correct? A. Yes, sir, he told me that they had sent up to get a man to raise the submarines. I don't believe he used the word salvaging.

Q. And you knew that Williams was salvaging the cargo —you saw that yourself? A. I saw that myself after the disaster had happened to the *Portmar*, yes, sir.

Q. And he did get out all of the Army trucks and other military equipment? A. I take it he did, I don't know, I was not there.

Q. You had no discussion with him at all about the possi-
1313 bility or salvaging the ship herself? A. No, sir.

Q. It was never even mentioned? A. No, sir.

Cross examination by Mr. Mount:

Q. Captain, I have just three questions here that I meant to ask you: As you lay on the beach at Channel Island following the raid on February 19th the forward part of the vessel was pretty free from water, wasn't it? A. Yes, sir.

Q. Now, when you saw the vessel at Brisbane did it show then that she was still free from water or were there traces of water having been in her, if you noticed, forward?
1314 A. No, sir, there was water in No. 1 and 2 but I could not draw any conclusions from that because the hatches were not there and it may be rain water, it might be sea water for all I know, I don't know, there was a little water in both 1 and 2.

Q. At Brisbane? A. At Brisbane when I first saw her, yes, sir.

Q. But when you left Darwin the forward hold did not have water in so far as you knew? A. No, sir.

Q. And the cargo was well stowed? A. Not according to Calmar standards they were not. They were hurriedly loaded, things that a seaman would not stand for at all the Army officers said that's all right, we haven't got time to worry about that.

1315

Q. Well, do you remember in your testimony at Melbourne saying that there was not much movement in the cargo because it was well stowed? A. I don't remember, sir, that that came up in the testimony but perhaps it did.

Q. Captain, I show you page 41 of the master's testimony in the salvage suit at Melbourne: "Q. And as the cargo included wheeled vehicles, guns and what not, that would, of course, tend to maintain the list on the ship, would not it? A. Yes. There was not very much movement because they had all been secured as well as possible"? A. Yes, sir.

1316

Q. That was the question and the answer? A. That was the question and the answer, undoubtedly so. May I say one word?

Q. Yes, please do. A. That does not mean that the cargo was well stowed by the stevedores or well secured by the stevedores because they did not secure anything. It means that the chief mate and I after the cargo was in the ship got together and I told the mate to secure that cargo as well as possible and he did so with the crew.

Q. Just one more question: Did you hear anything about negotiations between the United States Government and Calmar Steamship Corporation to sell the vessel to the Government after the raid at Darwin? A. No, sir, I did not.

1317

Cross examination by Mr. Collins:

Q. Isn't it a fact, Captain, that the Army after removing its cargo at Port Darwin forthwith took complete charge of the vessel because it considered it abandoned? A. I don't know, I was not there.

Q. Well, it was abandoned as far as you were concerned—I mean as far as your physical and direct contact with it was concerned, after you left Port Darwin for Melbourne, isn't that correct? A. No, sir, it is not.

Re-direct examination by Mr. Murphy:

Q. You were asked on cross-examination, Captain by Mr. Mount as to the distance from Darwin to Wyndham according to the log and you gave a mileage figure from the log. Will you please clarify that for me and explain how you reached that figure just so that we are sure of it. You can take the log and point out to me how you reached the figure you gave from Darwin to Wyndham? A. (Referring to log) I find under February 5th at noon, eighty miles from the point of departure. I made a mistake.
1319 Under the following date I find a distance of 120—that is 200—200, that is the total distance from the time of leaving or taking departure outside of Darwin, the total distance from entrance to entrance was 200 miles instead of as I said before 280. I had forgotten those figures and the only thing I can go by is what the log says.

Q. That is all right, I just wanted to get it straight on the record. A. From Wyndham entrance and up to Wyndham there was a long distance, a long narrow shallow crooked river.

Q. Captain, when you got on the train at Darwin on March 10th to go overland to Melbourne how did you
1320 travel? First can you tell us how that trip was made? A. Yes, that trip was made in open railroad trucks on a narrow gauge track as far as Birdum.

Q. Then what? A. Then the Australian Army furnished us transportation from Birdum through the desert to Alice Springs.

Q. What kind of transportation did the Australian Army furnish you? A. Military truck.

Q. And then what happened at Alice Springs? A. We were put on another narrow gauge railroad.

Q. Where did that take you? A. That took us to Adelaide.

Q. And then what happened? A. In Adelaide we got off the train.

Q. Now, let me stop at Adelaide for a moment. Can you give me an estimate of how much time you were on the original open narrow gauge railroad cars from Port Darwin to Birdum—how long was that section of the trip? A. Two days.

Q. And then from Birdum to Alice Springs in the Australian Army trucks how long were you on the road—about, you don't have to be exact? A. I have forgotten. When I say two days on the railroad that does not give an indication of the distance because sometimes they would stop for a few minutes.

1322

Q. That is all right. Suppose you just tell me then the approximate time you were on each form of transportation. Tell me how long you were on the Army trucks from Birdum to Alice Springs. A. I wouldn't like to make any mistake, but eight or nine days.

Q. Approximately? A. Yes, sir.

Q. And from Alice Springs to Adelaide by another narrow gauge railroad, how long was that section of the run? A. Two days.

Q. And then from Adelaide to Melbourne what kind of transportation was there? A. Rail again.

Q. And how long was that trip? A. We left Adelaide in the evening and we arrived at Melbourne the following morning.

1323

Q. I don't know whether I asked you, Captain, but I would like to ask you again if I missed it—what was Captain R. Douglas Taylor's position or occupation at Brisbane? A. Surveyor American Bureau and the British Corporation, also to Norwegian Veritas.

Q. All right. Now that you say it I think you have covered it. And Mr. A. G. Horn, what was his position? A. He was at the head of an engine works, I believe he was one of the owners of it, I am not quite certain. He was a marine engineer, held all British certificates, he had shortly before I had come to know him come back from Singapore where he had been ranking engineer officer in a British cruiser that had been sunk by the Japanese.

Q. And was he an engineer officer in the Navy? A. Yes, sir.

Q. With what rank? A. Commander.

Q. Returning for a moment to your trip across the desert, do you know how long a run that was across the desert from Birdum to Alice Springs in miles—can you make an approximation? A. Say a thousand miles.

Q. You were questioned by Mr. Collins as to your attempt to note protest after the bombing in the Timor Sea. Now, when you got back to Port Darwin in the convoy
1325 before the attack of February 19th did you attempt to note any protest, when you first got back? A. No, sir, I could not do it.

Q. Did you go ashore when you first got back? A. No, sir, I did not.

Q. What was the first time that you got ashore and attempted to note a protest? A. That was after I had seen Captain Williams and Colonel Petterson down at the ship and I went back in the launch.

Q. Was that after the vessel was beached? A. Yes, sir.

Q. In answer to Mr. Collins on cross examination as to when the United States Army took complete possession and control you mentioned the date of August 17, 1942. What
1326 event do you associate with the date August 17, 1942? A. I meant the formalities of passing ownership from my company to the Government but I know that I was mistaken in the date because that was a lot later on.

Q. By the formalities you have mentioned do you mean the actual requisition? A. Yes, sir.

Q. And may we understand that whenever the requisition actually took place, that is what you meant? A. Yes, sir. I had it in my mind, you see, without going over it yesterday, it was the 17th of some month.

Q. And is it your recollection that that was after August? A. Yes, sir, it is my recollection that that was later than August, considerably later.

Q. Was any special equipment required to get the cargo out of the *Portmar*? By that I mean the field pieces, ammu-

nition and military equipment? A. No, sir, none but what we had in the *Portmar* if it had been left there.

Q. Now a few questions about your testimony in the salvage suit in Australia: Captain, I will read you again that testimony so that you will know what I am talking about: (Reading) "Now, as a sailor, tell me this: Unless somebody did something to that ship after you had left her would you expect the ship ultimately to become a total loss or not? A. She could have laid there for a year or even longer and it would not have made any difference one way or the other". Now, Captain, I want to read you the next 1328
question and answer: "Q. Although she was lying under a strain? A. A certain strain, yes." What did you intend the Court to understand by your statement in the first answer just read that it would not have made any difference one way or the other? You may look at the question and answer there in the transcript—I have marked it in blue at the beginning and end. A. Yes, sir, I believe that is the answer I gave the Court.

Q. That's right, that is what you said this morning. Now, what did you mean by the statement that it would not have made any difference one way or the other if she had laid there a year or even longer? A. I mean that she was in a well-protected place as far as shelter goes. I mean 1329
that she had been damaged just about as much as she would have been if she had laid there quite a long while more.

Q. Now the next question to the one Mr. Mount read you was "Although she was lying under a strain? A. A certain strain, yes." Now, were you asked that question and did you make that answer? A. I believe so.

Q. Now, that strain that you spoke about, what was that strain? A. That strain was the lifting of the forward end of the ship when the tide came in twice a day. I thought then and I believe yet that as long as she stood it the first few days without breaking up she would stand it for a long time to come.

Q. Now on page 26 Mr. Mount read you the following question and answer: "You say there was no risk of that ship breaking its back; that is your story, is it? A. There was no more chance of breaking her back, as you call it, as there was the first or second day she came in if she had laid there for a year". Are we to understand that that expresses your opinion as you have just answered in your previous answer to me? A. Yes, sir.

Q. Now, Captain, following the questions which Mr. Mount read to you on pages 32 and 33, I wish to read you
1331 the next question on page 33 following what Mr. Mount read. The question is as follows: "And you would have, of course, plugged up the holes in the ship? A. Yes. Q. Were there any pumps and steam to be got in Darwin, do you know? A. I do not believe there was". Were those two questions asked you and did you make those answers? A. Yes, sir.

Q. If you had had the necessary equipment to commence a salvage operation on the ship what would be the first thing you would try to do? A. I would have plugged up the holes in the ship's side.

Q. And then what would you do? A. I would have put
1332 the pumps on and pumped the water out.

Q. At the time you were at the vessel in Port Darwin, say as of the last day you saw her, was it your judgment that the plugging of the holes and pumping the vessel out was a hopeless task or a difficult operation? A. It was in this way, that there was absolutely no way of getting either the pumps or the steam.

Q. I will now ask you to assume that you had the necessary pumps and that you had a craft alongside to supply the necessary steam, would the actual raising of the vessel to a floating position have been difficult? A. No, sir.

(The stenographer reads the following questions and answers to the witness:

"Q. What did you say? A. I told him that it was of much importance to me to get something done

about it and let the owners know what had happened because I had been unable to send a telegram from Darwin. I told him that I was going to tell my owners to give notice of abandonment to the insurers because I thought the ship was a constructive total loss.

Q. What did he say? A. He said, "Do you mean to say that you are abandoning the ship?" or something very nearly like it.

Q. What answer did you make to that? A. I do not know that I made any answer, because it struck me as strange that he did not understand what I meant when I told him that I was going to give notice of abandonment. It struck me that Captain Williams had taken it that I was going to tell my owners that I was abandoning the ship." 1334

Q. Now, you have heard those questions read again, Captain? A. Yes.

Q. And you said this morning that those were the questions asked and those were your answers. Now, I will read you the following question and answer: "You thought that he misunderstood you or else did not understand? A. Yes." Was that question asked you and did you make that answer? A. Yes, sir. 1335

Q. Now, Captain, this morning at one point in Mr. Mount's cross examination, you made the remark that you had not seen this testimony before and later, I believe, in answer to Mr. Collins, you said, "I have head that testimony through." How do you explain those two statements? A. I remember I told Mr. Mount that I had read it through. I don't believe that I ever said that I had never seen it before. If I said so, I meant that I had never seen it before now because I never saw it in Australia. It was not ready when I left Australia. If there is any doubt about it or if I made a mistake, I want to correct it now.

Q. Well, let us put it this way: When did you first see this copy of the testimony that was shown to you this morning? A. I saw that in your office here the other day.

1336

Q. Was that the first time you have read through a transcript of the testimony you gave in the salvage case? A. Yes. That is with qualifications again.

Q. What are they? A. Because a day or two after I had been up to the High Court in Australia Mr. Trumble had gotten a preliminary report like you got there and I sat down with him and he went over it and I noticed that this one here has missing several things that were said and happened in Court that is not in this one there. I also asked
1337 Mr. Trumble if that was to stand as he read it to me and he says, "Captain, it won't". He says, "The counsel on the other side and I will have to go over this and we will have to make some compromises" because some of this stuff that had been said in Court was not for the public records, I believe.

Q. Then are we to understand that you did not see what was shown to you as a final and complete transcript of the testimony before you left Australia? A. That's right, it was not a final report, no, sir.

Q. And that you did not see any transcript again of your testimony in the Australian salvage case until you came to this office the other day? A. No, sir, I have been
1338 to sea since and I have not had time.

Q. Is that right? A. Well, I have been to sea ever since but I have not been near an office—in fact I have never thought of the case since or bothered about it.

Recross examination by Mr. Collins:

Q. Do I understand that in your years as master at sea you never heard of the term "constructive total loss" of a vessel? A. Yes, sir, I heard it lots of times.

Q. I thought you told me— A. I don't dare to define it yet though unless I take a textbook or a law book of some kind and read up what it exactly means. I don't know, Mr. Collins, I am no lawyer and I don't pretend to be.

Q. The only reason I asked you the question was because in one of your answers to me on my cross-examination you at least expressed doubt as to the accuracy of the transcript because you said you did not know what the term "constructive total loss" meant, you did not use that term? A. I do in a general way, I know there is such a thing on a shipowner, he can on the loss of his ship abandon his ship to the underwriters.

Q. One other question, Captain. Your answer to my question as to when the Army took possession and control of the *Portmar* was August 17, 1942? A. Yes, sir, I believe 1340
it was.

Q. Then after cautioning by Mr. Murphy you were led to agree with him that you meant the time she was taken over by requisitioning of title on November 17, 1942? A. Mr. Collins, I am not led by anybody, even my attorney, to say things that I don't believe to be so.

Q. I did not think you would be. A. No, sir. I am not; I don't have anything to conceal and I am trying to tell the truth as near as I know it.

Q. In that connection let me ask you to look again at Libellant's Exhibit 40—do you remember your testimony in connection with that? A. Mr. Collins, at that time things 1341
were so confused that I did not know who was in charge of the ship. He drove me off the ship or kept me from going on the ship. He also did the same thing to Lloyd's surveyor.

Mr. Murphy: Who is "he"?

The Witness: I mean Captain Williams or his agents.

Q. Let me merely ask you this: It is true as you testified on your direct examination in the course of which this Libellant's Exhibit 40 for identification was marked that when you did attempt to go aboard the ship at Brisbane about the middle of August 1942 you were stopped by an American Army sentry and turned back. You then went to

see an American Army officer who gave you a pass, you were again turned back, and you finally were permitted on board only by going to your agents, then to Colonel Grimm in charge of the Army Transport Service at Brisbane, then got this pass from the Commonwealth Salvage Board, Exhibit 40 for identification, and only then were you permitted to go aboard the ship—that is correct, isn't it? A. Yes, sir.

Q. So the Army certainly was in possession and control or exercising possession and control at that time in the middle of August 1942?

1343

Mr. Murphy: I object to that as calling for a conclusion.

Mr. Collins: All right, I will withdraw the question.

Q. As to what control they exercised up to August 14, 1942 you personally did not know because you never saw the *Portmar*, as I understand your testimony, from the time you left Port Darwin for Melbourne and until you saw her again at Brisbane in the middle of August 1942? A. No, sir, that is right.

1344

By Mr. Mount:

Q. Captain, do you know who made temporary repairs at Brisbane? A. Yes, sir, I believe that was the American Army with help from the War Shipping Administration.

Mr. Collins: I move to strike that out as merely the captain's belief. I don't know whether it is so or not.

The Witness: It is so, Mr. Collins.

Mr. Collins: It may be, I don't know.

Re-direct examination by Mr. Murphy:

Q. Are we to understand, Captain, that in answer to Mr. Collins you stated that you did not know what happened

as to possession and control of the *Portmar* between the time you last saw the *Portmar* at Port Darwin and the time you next saw the *Portmar* at Brisbane, is that right? A. I have a good general idea but as to exact knowledge I have none.

Q. When you first got to Brisbane on the day the *Portmar* arrived there did you try to go on board? A. Not the first day.

Q. Was it the next day? A. I believe so.

Q. And can you tell us what day of the month that was, what the date was? If you want to refresh your recollection you can look at anything you wish. A. (Referring to notebook) That would have been one of the very first days in August most likely, 1942. 1346

Q. And what happened when you tried to get on board the *Portmar* the first time? A. The sentry told me I could not go aboard.

Q. And on that occasion did you have Colonel Plant's pass with you? A. Yes, sir.

Q. Did the sentry recognize that pass? A. No, sir.

Q. To refresh your recollection I show you Libellant's Exhibit 39—was that the Colonel Plant pass which you showed the sentry? A. Yes, sir.

Q. And the sentry did not recognize that pass? A. No. 1347

Q. And the sentry did not permit you to go aboard the ship even though you had that pass? A. No, sir.

Deposition of Joseph E. Bullock—Libelant's Exhibit 50.

JOSEPH E. BULLOCK, being duly sworn and examined as a witness on behalf of the libellant, in accordance with the requirements of Rule XLIV of the United States District Court, testified as follows:

By Mr. Murphy:

Q. Where do you reside, Mr. Bullock? A. I reside in Laurel, Nebraska.

1348 Q. And where were you born? A. I was born at Black Mountain, North Carolina.

Q. What is your present occupation? A. Ship master.

Q. Do you hold a master's license? A. Yes, sir.

Q. How long have you held that master's license? A. Since 1940.

Q. How long have you been going to sea? A. Since 1932.

Q. Has all your experience been in the deck department or in the engineroom? A. I spent three years in a State training school and in that school I was part of the time in the engineroom.

1349 Q. In your actual experience at sea have you served on deck or in the engineroom? A. On deck.

Q. Who is your present employer? A. Calmar Steamship Corporation.

Q. Are you now master of a vessel owned by Calmar Steamship Corporation? A. No, sir.

Q. Is the vessel operated by Calmar Steamship Corporation? A. No, sir.

Q. Who is your present employer? A. Calmar Steamship Corporation.

Q. Who pays your wages and your salary now? A. Calmar Steamship Corporation.

1350 Q. Are we to understand that you are master of a ship at the present moment? A. No.

Q. When were you last master of a ship? A. Last Friday.

Q. And what ship was that? A. The steamship *Marymar.*

Q. And who operated that ship? A. The Calmar Steamship Corporation.

Q. Are you waiting for another command now? A. Yes, sir.

Q. How long have you been in the employ of Calmar Steamship Corporation? A. Ten years.

Q. On November 21, 1941 were you in the employ of Calmar Steamship Corporation? A. Yes, sir, I was.

Q. In what capacity? A. Chief mate.

Q. Of what ship? A. Steamship *Portmar.*

Q. On November 21, 1941 where was the *Portmar*? A. That is a little too long ago for me to remember right the date.

Mr. Mount: Let him look at the log.

Q. You may refresh your recollection from the log. A. (Referring to log) November 21st the ship was at sea.

Q. Bound for what port? A. Bound for the port of San Francisco. 1352

Q. When did she get to San Francisco? A. She arrived at San Francisco on November 23rd.

Q. And did she start to load a cargo when she got to San Francisco? A. Yes, sir, she did.

Q. As chief officer of the vessel did you know what that cargo was? A. In a general way, yes, sir.

Q. What was it? A. It consisted of aviation gasoline and general equipment for the United States Army.

Q. And where was that cargo consigned? A. Consigned to Manila, Philippine Islands.

Q. To the U. S. Army at Manila? A. Yes, sir.

Q. Did you have a manifest for that cargo? By manifest I mean a detailed manifest setting forth each specification of each particular kind of cargo and quantity? A. No, sir. 1353

Q. When did the vessel sail from San Francisco for Manila? A. (Referring to log) She sailed on November 28th.

Q. Were you present when the master received his sailing orders for that voyage? A. No, sir.

Q. Do you know where his sailing orders came from? A. Yes, sir, I believe I do.

Q. Where did they come from? A. They came from the United States Navy.

Q. Do you know in what form they were given to the captain? A. Yes, sir.

Q. What form was it? A. They were written.

Q. Were they open or were they enclosed in anything? A. They were sealed when I first saw them.

Q. Where did you first see them? A. I first saw them in the captain's office right after we had taken departure.

Q. Did the Captain open the orders? A. Yes, sir.

Q. Did you see those orders? A. Yes, sir.

Q. In a general way what did those orders consist of? A. The orders consisted of the route that the ship was to follow to her distination at Manila giving a number of positions or points through which she was to pass.

1355 Q. Did you have access to those orders in plotting the various courses of the vessel? A. Yes, sir, I did.

Q. Were those orders followed from there out on the voyage? A. They were followed until three or four days after the war had been declared.

Q. Did you receive any orders as to radio silence on the *Portmar*? A. The night that war was declared or the night after war was declared we received a message in code from the United States Navy and this coded message among other things instructed us to maintain radio silence.

Q. Would that be approximately December 8, 1941? A. It would be the night between the 7th and the 8th, I couldn't say exactly what hour it was, but I helped decode

1356 the message.

Q. In the sealed orders the captain got were there any instructions as to radio silence? A. I don't remember.

Q. Do you know whether the captain had any orders as to radio silence before you got this coded message from the Navy on the night after war was declared?

Mr. Collins: I think we ought to object to that on security grounds. It seems to me it is going into something which is not relevant in this case as to instructions of that character being given by the Navy before war was declared. I don't think we ought to go into it.

Mr. Murphy: I am perfectly willing not to go into it. I was simply bringing out all the facts. On

your statement that it does not apply it suits me. On that basis I withdraw the question.

Q. Now, what date was it when you received orders changing the orders as to course which you received in sealed form on sailing? A. December 11th.

Q. Tell us what happened on December 11, 1941. A. On December 11th the captain called me to his cabin and told me that he had received a coded message from the Navy.

Q. Did you have anything to do with that coded message? A. Yes, I did, I assisted in decoding it. 1358

Q. In a general way what did that message say? A. It instructed the master to change the route of the vessel and report to the American Naval Liaison officer in Suva, Fiji Islands.

Q. Did that message say anything about taking the orders from the British or the Australian Naval Control officer at Suva? A. No, sir.

Q. What date did the *Portmar* arrive at Suva? A. (Referring to log.) The *Portmar* arrived at Suva on December 20th.

Q. When the *Portmar* got to Suva to whom did the master report so far as you know? A. If I remember, after we had anchored in Suva Harbor in the night or late afternoon December 20th some American naval personnel came on board and talked to the captain in his quarters. I assume that he reported to them. 1359

Q. Did you ever see any British or Australian naval officers come on board? A. Yes, sir, the following day we went to the dock to take on water and I remember the British naval officer coming aboard with this American Naval Liaison officer.

Q. Did they both speak to the captain? A. Yes, sir.

Q. Were you present? A. No, sir.

Q. Did you hear either of those officers, either the British or the American, give any orders to the captain as to what he was to do? A. No.

1360 *Deposition of Joseph E. Bullock—Direct.*

Q. Did you see any written orders which were given to the captain? A. Yes, sir.

Q. Do you know where he got those written orders? A. To the best of my recollection they were signed by either some British or Australian naval officer in Suva.

Q. And what did those orders tell the master to do? A. They told the master to take his ship to Sydney, Australia.

Q. Did the *Portmar* maintain radio silence from there on? A. Yes, to the best of my knowledge she did.

1361 Q. When did you leave Suva? A. (Referring to log) We left Suva on the 22nd of December.

Q. And when did you arrive at Sydney? A. We arrived at Sydney the 30th of December.

Q. Did you go with the master on shore to report to any military authorities there? A. No, sir.

Q. Did any military authorities come aboard the vessel and speak to the master in your presence at Sydney? A. Not in my presence, no, sir.

Q. Did you see any written orders on board the vessel for procedure of the *Portmar* from Sydney? A. No, sir—from Sydney?

1362 Q. Yes. A. Yes, I did see them.

Q. Who had those orders? A. The captain did.

Q. Was there any signature on those orders, if you remember? A. Well, I cannot remember whether there was a signature but I know that the orders were the same as the others had been in the past, they gave the ship a definite route and the authority of the Royal Australian Navy behind them.

Q. Is it your recollection that they were written orders from the Royal Australian Navy? A. Yes.

Q. Where did they tell the *Portmar* to go? A. They directed the master to take the *Portmar* to Brisbane.

Q. While you were at Sydney was there any discussion between you and anyone from shore regarding the cargo? A. Yes, sir, there was.

Q. What was that? A. I remember that some military representative of the United States Army came on board to determine the nature of our cargo exactly and it was then I discovered that the master did not have a manifest— as I said before I did not have one. We had on board the vessel three United States Army non-commissioned officers and it was learned at that time that one of them had a complete manifest of the cargo which he had been directed to deliver to some authority when the vessel arrived at Manila. This American Army representative after examining the manifest and looking at the cargo we had on deck returned to 1364 shore that same day.

Q. He what? A. After he had examined the manifest and the cargo we had on deck he returned to shore that same day.

Q. Was any cargo discharged from the *Portmar* at Sydney? A. No, sir.

Q. When did you leave Sydney? A. (Referring to log). We left Sydney on the 2nd of January.

Q. And when did you arrive at Brisbane? A. We arrived at Brisbane on January 5th.

Q. Now tell us what happened with regard to the cargo at Brisbane. A. At Brisbane the cargo was partly discharged from the vessel so that it could be re-allocated 1365 apparently and a large part of it was returned to the vessel with some of it being left ashore and other cargo left in its place.

Q. Do you know who gave the instructions as to what cargo was to be re-loaded and what cargo was to be left ashore? A. The United States Army was supervising the unloading and loading of the cargo throughout.

Q. Were any orders received at Brisbane so far as you know as to where the vessel was to go from Brisbane? A. Yes, sir, we received written orders there too.

Q. From whom? A. From the Royal Australian Navy.

Q. Where did those orders tell you to go? A. They directed the master to take the vessel to Darwin, Northern Territory of Australia.

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Q. When you left Brisbane what did your cargo consist of? A. Our cargo consisted of the same quantity of aviation gasoline and miscellaneous supplies for the United States Army.

Q. On what date did you leave Brisbane? A. (Referring to log) We left Brisbane on the 9th of January.

Q. Did you go direct to Port Darwin? A. No, sir.

Q. What happened? A. If I remember, we stopped over at Thursday Island.

Q. Were any orders received to put into Thursday
1367 Island? A. Well, the orders directed the vessel to proceed via Thursday Island but we had a pilot for the inside channel behind Barrier Reef, he came aboard at Brisbane and was to be debarked at Thursday Island and upon arrival at Thursday Island I remember the naval authorities there placed the vessel in convoy and we had to wait for some time for this convoy to be made up.

Q. When the convoy was made up did you go on to Port Darwin in the convoy? A. Yes, sir.

Q. What date did you arrive at Thursday Island?

Mr. Collins: Isn't this all covered in the master's testimony?

1368 Mr. Murphy: It is.

Mr. Collins: I mean as to the routing?

Mr. Murphy: Well, we are almost at Darwin now.

A. We arrived at Thursday Island on the 15th of January in the afternoon.

Q. And when did you leave Thursday Island? A. We left Thursday Island the afternoon of January 16th.

Q. In the convoy? A. Yes, sir.

Q. And did you have a military escort? A. Yes, sir, we had a naval escort of two corvettes as I remember.

Q. When did you arrive at Port Darwin? A. We arrived at Port Darwin January 19th.

Q. Did you go to a pier or did you anchor when you got to Port Darwin? A. We anchored.

Q. How long did you lie at that anchorage? A. As I remember it was some time because the harbor was congested with vessels that had priority at the only dock there. (Referring to log) We docked the vessel January 31st.

Q. Under whose orders did you go into the dock? A. Under the orders of the harbor master who was an officer of the Royal Australian Navy.

Q. Did you discharge cargo at Port Darwin? A. Yes, sir, we did.

Q. How much cargo did you discharge? A. As I recall we discharged all of our cargo with the exception of about 1370
1700 drums of gasoline.

Q. Is there anything in your log about the number of drums that you held on board at Darwin on the discharge on January 31st or after that date? A. (Referring to log) No, sir, there is nothing in the logbook as to the quantity.

Q. It is your best recollection that you held 1700 drums of aviation gasoline on board, is that right? A. Yes, sir. In addition to that we——

Q. Wait a moment. Under whose instructions and at whose orders was that cargo discharged? A. The United States Army was issuing the orders and supervising the loading.

1371

Q. I think you started to say you re-loaded. Under whose orders did you re-load some cargo? A. Under the same people, United States Army.

Q. What did you re-load? A. We loaded some more gasoline and some additional lubricating oil.

Q. About how many drums did you have on board when you finished re-loading? A. It was supposed to have been 2100 drums altogether.

Q. That would be how many drums of lubricating oil? A. 100.

Q. That would be 2000 drums of gasoline and 100 of lubricating oil? A. Yes, sir.

Q. Did the vessel receive any orders as to where to go with that gasoline and lubricating oil? A. Yes, sir, she did.

Q. What were those orders? A. They were orders to the master to take the vessel to Wyndham.

Q. Were they written? A. To the best of my recollection they were.

Q. Who gave those orders to the master? A. They were signed by an authority of the Royal Australian Navy.

Q. Did they include any instructions as to where to go after she got to Wyndham? A. I believe they did, they instructed the vessel to return to Darwin.

Q. On what date did you leave Port Darwin for Wyndham? A. (Referring to log) The vessel left Darwin February 4th.

1373

Q. Did you have a military escort to Wyndham? A. Yes, sir, we had a Royal Australian Navy vessel escorting us to the entrance to the Bay outside of Wyndham.

Q. What day did you arrive at Wyndham? A. We arrived at Wyndham February 8th.

Q. Did you discharge cargo there? A. Yes, sir, we did.

Q. What did you discharge? A. We discharged 2100 drums of gasoline and lubricating oil.

Q. That is all the gasoline and all the lubricating oil? A. Yes sir.

1374

Q. Was the ship then empty except for dunnage? A. Yes, sir.

Q. What did the vessel do then? A. The vessel returned to Darwin.

Q. What day did you leave Wyndham? A. We left Wyndham on February 10th.

Q. When did you arrive at Darwin? A. We arrived at Darwin February 12th.

Q. Was that return from Wyndham to Darwin pursuant to the written orders the master received before leaving Port Darwin for Wyndham? A. Yes, sir.

Q. On the way back from Wyndham to Darwin did you have military escort? A. We did for the last half of the voyage.

Q. When you arrived at Port Darwin on February 12th did you go to a dock or did you come to anchor? A. We came to anchor.

Q. On whose orders? A. As I recall we were given orders to anchor by blinker signal.

Q. From where? A. From the Royal Australian Navy.

Q. After you came to anchor in Darwin did you ever go to a dock in Darwin there? A. Yes, sir, we did.

Q. When? A. February 13th.

Q. At about what time? A. Shortly before 8 o'clock in the morning. 1376

Q. Did you get any orders as to going into the dock? A. Yes, sir, we did.

Q. What were those orders and from whom did they come? A. Well, I did not witness the giving of the orders personally, didn't see anything of it.

Q. Did anyone come on board the vessel? A. Yes, sir.

Q. Who? A. Some military authorities.

Q. Of which service? A. Royal Australian Navy.

Q. After that did you move into the dock? A. Yes, sir, we did.

Q. And what happened there? A. There we loaded a——

Q. Well, first did you discharge anything when you got to the dock that morning? A. Yes, sir, we had a good deal of dunnage in all of the holds which had not been cleaned up. 1377

Q. Was that dunnage discharged? A. Yes, sir, it was.

Q. On whose orders? A. That was on the orders of the United States Army who was supervising it.

Q. After that did you load anything? A. Yes, sir, we did, we loaded another cargo.

Q. What was it? A. It consisted of military supplies belonging to the United States Army and the Royal Australian Army. We also loaded roughly 300 United States Army personnel.

Q. Were there any field pieces included in the materiel which you loaded at Darwin that day and following that day? A. Yes, sir.

1378 Q. What were they? A. I have no technical knowledge but they told me that they were 75-millimeter field guns and 37-75 and 37-millimeter field guns, their ammunition and all necessary equipment.

Q. Do you remember the unit of the troops which you took on board? A. As I recall they were 147th Regiment Field Artillery or the 148th, I cannot recall which.

Mr. Mount: Let us agree it was the 148th.

Mr. Collins: I think that is correct, I wouldn't swear to it. It is in the captain's testimony.

1379 Mr. Murphy: The captain said the 148th.

Q. What kind of material was loaded on board belonging to the Australian Army? A. It consisted of tentage and barbed wire.

Q. Was there anything loaded on deck belonging to the Australian Army? A. Well, I didn't know at the time it belonged to the Australian Army but I learned later it belonged to it—it was a launch, heavy motor launch.

Q. Was the name of that launch the *Nevbet*? A. Yes.

Q. When did you finish loading that cargo? A. We finished loading that cargo February 14th.

1380 Q. 1942? A. Yes, sir.

Q. And what did the vessel do then? A. The vessel proceeded from the dock into the stream of Port Darwin.

Q. Did you come to anchor? A. Yes, sir.

Q. Did you load anything while you were at anchor? A. Yes, sir, we loaded some ammunition.

Q. Any small arms? A. Yes.

Q. What? A. Yes, sir, we did, we loaded—if I remember we loaded rifles for all the men we had aboard and ammunition for all those rifles and the men, the Army personnel on board while they were unloading the rifles—

Q. While you were loading the rifles? A. While we were taking the rifles aboard they emptied the rifles from the boxes and re-packed their own rifles and we sent the boxes back in the lighter.

Q. You mean they re-packed their own rifles in the boxes—there was an exchange of rifles of the troops, is that what we are to understand? A. That is right.

Q. And they put the rifles they formerly had in the boxes and they were put back on what? A. On the lighter.

Q. Are we to understand that the troops came aboard at the pier? A. Right.

Q. Under whose orders were all this cargo and troops and material and equipment taken on board the vessel? A. To the best of my knowledge it was under the orders of the United States Army authorities in Port Darwin. 1382

Q. Do you know whether the master of the vessel received any orders as to where the vessel was to go from that anchorage? A. Yes sir, I know that he received orders.

Q. Do you know where he got the orders? A. Yes sir, after we had anchored the vessel in the stream that evening he was taken aboard the United States war vessel and there he received the orders.

Q. Was that the cruiser *Houston*? A. Yes, sir.

Q. Were you present on board the *Houston* when he received his orders? A. No, sir.

Q. After that did the *Portmar* get under way? A. The *Portmar* got under way very early in the morning of February 15, 1942. 1383

Q. About what time? A. About 1 o'clock.

Q. 1 A. M.? A. Yes, sir.

Q. Were you alone or were you in formation? A. We were in convoy formation.

Q. Can you name the other vessels in the convoy? A. There was the United States Army Transport *Meiggs*, the steamship *Mauna Loa*, the motorship *Tulagi*, the *Portmar*, the United States Cruiser formerly mentioned.

Q. Wait a moment—the four vessels you have named were merchant vessels? A. Right.

Q. Now, what was the military escort? A. As I recall it consisted of the United States *Houston*, the United States *Perry*——

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Q. Was that a destroyer? A. Yes, it was—and two Royal Australian naval vessels.

Q. Was there another destroyer? I suggest the *Preston.* A. I cannot recall, I only remember the one.

Q. In what direction did the *Portmar* proceed in that convoy? A. The convoy proceeded in a general westerly direction.

Q. As chief officer of the vessel did the master inform you where you were going? A. Yes, he did.

Q. What did he say? A. He said we were proceeding
1385 to Koepang, Timor.

Q. Will you describe the events of that voyage—what happened on the 15th of February 1942? A. We were proceeding in convoy when on the afternoon of February 15th we sighted some planes flying very high.

Q. How many? A. As I remember it was only one.

Q. Go ahead. A. And my attention was drawn to it by the noise of the anti-aircraft gun fire that was being directed toward it.

Q. Was there any anti-aircraft fire from your ship? A. Yes, sir, there was.

Q. What was it? A. The Army troops on board the vessel had set up four of their 50 calibre machine guns.
1386

Q. Were they in action? A. Yes, they were.

Q. Were any bombs dropped on the afternoon of February 15th by that enemy plane that you have described? A. I don't rightly know whether they dropped bombs or not.

Q. So far as you know did the *Portmar* receive any damage on the afternoon of February 15th? A. No, sir, not so far as I know.

Q. Did the *Portmar* continue on the voyage? A. Yes, sir, she did.

Q. Did the convoy disperse on the afternoon of the 15th when that enemy plane appeared? A. No, sir.

Q. Did that enemy plane go away after the anti-aircraft fire opened up? A. Yes, sir, it did.

Q. Did the convoy continue on the regular course? A. Yes, sir, it did.

Q. Now will you describe to us the events of February 16, 1942? A. About 11:20 on February 16th a large number of enemy airplanes were sighted and began to attack the convoy at once.

Q. How long did that attack last? A. That attack lasted about fifty-five minutes.

Q. Now, will you tell us the details as far as you remember them? A. Well, as I remember the bombers came in in one formation of 27 planes at first and this formation split up into three parts of nine each. At first they all tried to bomb the cruiser, which was the senior escort and 1388
had the most protection for the convoy in guns, and in due time they attacked all the ships in the convoy by dropping bombs.

Q. Did the convoy disperse? A. Yes, it did.

Q. All right, tell us the details as you remember them. A. We began to zigzag and make as much smoke as we possibly could just as all the other vessels in the convoy were doing.

Q. Where were you during these events, where were you standing? A. Part of the time I was on the shelterdeck, that is the top of the shelterdeck or the bridge deck.

Q. Just a moment. The shelterdeck is what? A. On 1389
top of the shelterdeck or the bridge deck.

Q. Is that exposed to the open air? A. Yes, sir.

Q. Would you call that the boat deck? A. No.

Q. Will you point out to us on this plan, Libellant's Exhibit 2, what you refer to as the place you were standing? A. My quarters were on the starboard side of that deck (indicating).

Mr. Murphy: Pointing to the area below the word "Saloon", just below the word "Saloon".

The Witness: Yes.

Q. And where were you standing? A. Part of the time I was standing right there (indicating).

Mr. Murphy: Witness points to a place which I will mark with a cross in a circle.

Q. On which side, port side or starboard side? A. Starboard side. That was previous——

Q. Is that open to the sky? A. No, there is a captain's deck extends over that.

Q. The captain's deck is above it? A. Yes. I was there when the planes first appeared and it was from there I watched them attack the cruiser *Houston*. During the
1391 remainder of that hour the attack was going on I cannot remember exactly where I was all the time but I do remember being in the, just inside of the shelterdeck cargo door on the starboard side on one occasion.

Q. Where is the shelterdeck? A. This is the shelter bridge deck right about where that arrow is (indicating).

Mr. Murphy: Witness points to the deck.

Q. Is it on the level of that arrow? A. That is right.

Q. Is that a deck where that arrow is? A. No.

Q. The deck is the line below it? A. That's right, that is the maindeck, this is the bridge deck or shelterdeck space
1392 (indicating).

Q. Is the deck you were standing on the maindeck running through the superstructure? A. Yes.

Q. Then we will mark the place where you were first "X" in a circle, "1", and then we will mark the place you have designated "X" in a circle "2"—is that right? A. Yes.

Q. Now will you describe what you saw? A. I remember watching the *Houston* as she was evading the bombs being dropped by enemy airplanes from the deck outside of my room in admiration, you might say, the way between the time the bombs were dropped from the airplanes she would change her course 180 degrees and thereby avoid them.

Q. By that you mean she would completely reverse her course? A. Yes.

Q. Was she going at full speed? A. Yes, that is what made it so interesting, when she put her wheel or her rudder hard over the wave thrown up by the sharp turn she made was almost as high as she was, but after they had tried unsuccessfully to bomb the *Houston* the planes broke up again in their formation and sometimes one plane and sometimes three in a formation would attack the *Portmar* among the other vessels.

Q. Will you say whether or not any bombs came near the *Portmar* and what you observed? A. Yes sir, when the planes began to attack or fly directly over the *Portmar* in a direct line with her we could see that they were attempting to bomb her. I took shelter in the position already shown you. 1394

Q. As "X" in a circle "2"? A. Yes. I was there when they dropped the first bomb. It was somewhere just astern of the vessel.

Q. Did you see that bomb land in the water? A. No sir, I did not see it.

Q. Could you feel it? A. Yes sir.

Q. Go ahead. A. And I was also there when they dropped some bombs near the port side, the after welldeck. 1395

Q. Could you see those bombs drop in the water? A. No sir.

Q. You were in the shelterdeck forward on the starboard side? A. Yes sir.

Q. Could you feel those bombs? A. Yes sir.

Q. At the time did you know how many there were that fell on the port side? A. No sir.

Q. Describe next what you observed? A. Immediately after that, after the bombs had dropped on the port side aft I came through the shelterdeck onto the after welldeck and found the decks full of water there that had been thrown up by the concussion of those bombs.

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Q. Where were you then when you saw the water that had been thrown up by the concussion? A. That would be on the port side of the after welldeck.

Q. Indicated on perhaps plan No. 3?

(Witness indicates).

Mr. Murphy: Witness puts an "X" in a circle "3" on plan No. 3.

Q. That was where you stood when you observed the water on the after welldeck? A. Yes. While I was there
1397 I looked over the side of the ship anticipating finding some holes in the ship's side from the bombs that were just dropped there but I could not locate anything at all. Then I returned to my station already indicated as position "2".

Q. That is the shelterdeck starboard side forward? A. Yes, and while I was there there was some bombs dropped close to the starboard side forward.

Q. Did you see those bombs fall in the water? A. Yes sir.

Q. How far away from the side of the ship were they? A. I should say they were between forty and fifty feet away at the most.

1398 Q. Could you feel the shock and concussion of those bombs? A. Yes sir.

Q. Describe what happened next. A. Well, as I remember it there were more bombs dropped, this time further aft on the starboard side.

Q. About how far from the ship? A. I did not see those fall but I do know they threw water on the deck.

Q. Did you feel the concussion? A. Oh yes.

Q. Did any bombs fall forward of the ship? A. Well, this group of bombs that I mentioned seeing fall, they were in a line you might say, the ones that I saw dropped.

Q. They were in a line on the starboard side? A. On the starboard side about abreast the foremast and they were forward of the ship.

Q. In a line toward forward? A. Yes.

Q. Did you see any bombs fall dead ahead of the ship? A. No sir, I did not see them.

Q. Did you hear them or feel them? A. Frankly it would be very difficult for me to remember two hours afterwards whether I saw any there. It seemed to me I do remember the ones on the starboard side, seeing those fall—as I say, they were in a line, in other words, they were a stick of bombs as they call it.

Q. About how many? A. I wouldn't say.

Q. You are not sure whether you saw any bombs after 1400
that fall forward of the ship? A. No.

Q. Did you go on the navigating bridge at all while all this was going on during this attack? A. I don't recall whether I was on the bridge during the actual attack or not.

Q. After the attack had finished did you make any examination of the ship's hull? A. Yes, sir, I did.

Q. What did you do? A. I examined the ship's hull immediately after each one of these sticks of bombs had fallen.

Q. How did you make that examination? A. By leaning as far out over the main deck rail as I could and peering
down at the ship's side. 1401

Q. Did you see any evidence of damage? A. No, sir, I couldn't see a thing.

Q. Did you make any examination of the inside of the ship? A. Immediately after the attacking planes departed I sent the carpenter to sound bilges.

Q. Did he make any report to you after he had sounded the bilges? A. Yes.

Q. What did his report show? A. He reported that his soundings were the same as they had been that morning at 8 o'clock—he sounds the bilges every morning at 8.

Q. Did you make any examination of the interior structure of the ship? A. Yes, sir.

time—in fact, you could not mistake it then, the ammonia system had been punctured and that whole area of the ship was unapproachable.

Q. After you observed the condition of the navigating compass what did you do? A. I remained with Captain Michelson for a while on the bridge and in the meantime it was brought to my——

Q. Was the vessel under way? A. Yes, sir.

Q. How was the captain navigating? A. He was navigating the vessel just by eye and by sighting the hills, the
1433 landmarks.

Q. What happened after that? A. Shortly after that information was brought to me there was a fire in No. 4 hold.

Q. Who reported that? A. The second officer.

Q. What did you do? A. I immediately proceeded to No. 4 lower hold.

Q. What did you find there? A. I found that some of the projectiles or bomb fragments had penetrated the ship's side and set on fire some of the things in No. 4 lower hold.

Q. Did you make any inspection at that time of the effect of the aerial fire and bomb fragments on the shell of the vessel? A. Yes, sir, the shell of the vessel in the way
1434 of Nos. 4 and 5 lower holds on the port side was perforated in a very great many places. Through some of them the water was pouring. The majority of them were in the area just above the water line of the ship.

Q. What was the general area in which the skin of the ship was perforated as you have described? A. Well, I should say that it extended from what I could see in 4 and 5 lower holds, it extended from the engineroom bulkhead aft along the port side as far as the bulkhead of the tunnel recess.

Q. On Libellant's Exhibit 2 there have been placed some red marks on the plan No. 3. Do those red marks approximately correctly represent the area in which the perfora-

tions of the aerial and gun fire were found by you? A. Yes, sir.

Q. What did you do about the fire in No. 4 hold? A. I extinguished the fire in No. 4 hold and returned as soon as possible to the forecastlehead because we were getting ready to anchor.

Q. On the way did you make any report to the master? A. Yes, sir, I reported to the master that the vessel's shell was perforated as I said before.

Q. Did you report that the vessel was making water in the holds where the shell was perforated? A. Yes, sir. 1436

Q. Did you report that the fire was under control? A. Yes, sir.

Q. Did you give any orders as to making arrangements to put the launch overboard? A. Yes, sir, when Captain Michelson told me that he intended to disembark the soldiers I put the sailors to work rigging a jumbo boom at No. 2 hatch in preparation for lowering the motorboat *Neubet* over the side.

Q. Did you say a jumbo boom or the jumbo boom? A. It was the only one on the vessel so it would be the jumbo boom.

Q. Did the crew succeed in getting the rigging of the jumbo boom in condition sufficient to operate? A. Yes, sir, they did. 1437

Q. Did the vessel thereafter come to anchor? A. Yes, sir, we anchored the vessel.

Q. At what point? A. Just to the westward of a small island in the Middle Arm of the harbor.

Q. On Libellant's Exhibit 4 the captain has placed a mark labeled "*Portmar* anchored 1.05 P. M. February 19, 1942". Does that correctly represent the position at which the *Portmar* anchored? A. Yes, sir, it does.

Q. After the vessel came to anchor what did you do? A. After the vessel came to anchor we lowered this motorboat *Neubet* over the side and began at once to carry the soldiers from the *Portmar* to this island which had some buildings on it.

Q. What did you find? A. I found that the rust and paint in the way of all joints between the frames and the shell plating between the strakes and bolts in the shell plating had been jarred and cracked so that you could see the spaces between them. You could also see where any loose rust on the under side of the decks or beams in the ship's structure had been jarred loose and shaken down in big piles in places where it could not be protected by paint and covered. I remember more particularly on the portside aft Nos. 4 and 5 lower holds that this was particularly noticeable.

1403

Q. What effect did the concussion of the bombs have on the general structure of the ship? A. Well, it seemed to me that the ship, all of the joints in the ship, as I say, showed a space between the two parts. It seemed to me that the whole structure had been loosened, you might say—in other words, the joints between the parts of the ship had loosened an appreciable amount so that the vessel's ordinary vibration was not the same as it had been, she was not as stiff as she had been.

Q. Did you go into the engineroom and make an examination there? A. No, sir.

1404

Q. Did you make a report to the captain? A. Yes, sir, I did, after the carpenter finished sounding his bilges and also after having made that examination of the interior of the hull myself I reported to the captain what I found.

Q. After that what did the *Portmar* do? A. According to my logbook which I was keeping at the time, the bombers departed at 12:15 P. M. We resumed our convoy formation at 12:30.

Q. And continued for how long? A. Continued right in this formation until 3:40 P. M. when the course was virtually reversed.

Q. At whose orders? A. That was at the orders of the senior officer of the escort, who was the commanding officer of the SS. *Houston*.

Q. Reversing course where did the convoy go? A. The convoy proceeded back to Darwin by way of coastal route.

Q. At what point did the convoy reach the north coast of Australia again? A. I don't recall exactly but I do remember passing the entrance to the Gulf of Cambridge right closely.

Q. Thence did the convoy follow along the coast to Port Darwin? A. Yes, right close.

Q. What time did you get back to Darwin? A. We got back to Darwin the morning of February 18th.

Adjourned to August 3, 1945, 10:30 A. M. 1406

Met pursuant to adjournment, August 3, 1945, 10:30 A. M.

Present as before.

JOSEPH E. BULLOCK resumes the stand.

Direct examination continued by Mr. Murphy: 1407

Q. When the *Portmar* got back to Darwin on February 18th did you go direct to a pier or did you anchor? A. We anchored.

Q. At whose order did the *Portmar* come to anchor? A. The *Portmar* anchored under the orders of the Royal Australian Navy Control at Port Darwin.

Q. Did they designate the position at which the *Portmar* was to anchor? A. Yes, sir, in Port Darwin they always signaled an exact location by giving us a bearing so many yards from the light house.

Q. Did the *Portmar* anchor at the position so designated? A. Yes, sir, she did.

Q. I show you a chart marked as Libellant's Exhibit 4 and on it is an indicated position with the legend "*Portmar* anchored February 18, 1942". Was that the position at which the *Portmar* anchored when she came back to Darwin at about noon of February 18, 1942? A. Yes, sir, that is the position.

Q. Did you receive any information from the Royal Australian naval authorities as to when you would go alongside the wharf and what you would do there? A. Yes, sir, right after we anchored we were told by the harbor master
1409 that we would very probably go alongside the dock that evening, disembark the troops and unload the cargo.

Q. Was that order carried out and did the *Portmar* do that? A. No, sir, later on that afternoon that order was withdrawn and we were told to be ready to go alongside the dock very early the next morning.

Q. Were any further orders received directing the *Portmar* to go alongside the dock and disembark troops and unload equipment? A. No, sir, the next morning very early that order itself was rescinded and we remained at anchor. Another vessel went in and took the berth at Darwin.

Q. Will you describe the events of the morning of Feb-
1410 ruary 19, 1942 while the *Portmar* lay at anchor in the position indicated on the chart as you have described? A. Shortly before 10 o'clock in the morning I was standing on the starboard side of the bridge deck right outside my quarters with the chief engineer and we heard a big roar made by a great number of airplanes approaching the port of Darwin from the direction of the sun. When we first saw them we imagined it would be American planes or Allied planes rather. The first of the planes we were able to see was a big formation of high altitude bombers and these bombers came in over the docks at Darwin. The first indication we had of them being enemy planes was the explosion of the bombs on the docks and around the town of Darwin. These planes continued to bomb the town and the airfield behind it and a number of the vessels at anchor from high

altitude. Very few minutes after they had begun their bombing our ship was attacked by dive bombers.

Q. Just pause a moment there. Did the bombing attack on the town and on other vessels have any effect on other vessels before the bombers attacked the *Portmar*? A. Yes, sir, one of the—we saw the ship that had taken the berth alongside the dock that we were supposed to have taken struck with a bomb. Shortly after that a big explosion went up, she rolled right over on her side, and we saw an American destroyer that had been one of our escorts in a recent convoy struck by dive bombers and she went up in a big 1412
burst of flame. We also saw the large Allied hospital ship struck by a bomb. She was lying in the East Arm of the harbor. We also saw a tanker that was lying quite close to the docks at Darwin struck, and high altitude bombers was also attacking the United States Army Transport *Meiggs* and she was sinking.

Q. At the time that attack began did Captain Michelson give you any order? A. Yes, sir, when the attack began I reported to him at once. He told me to swing out the lifeboats and lower them to the level of the rail on the bridge deck.

Q. Where were those lifeboats carried on the *Portmar* 1413
at the time you got that order? A. The lifeboats were hanging on their davits on the boat deck swung in.

Q. Which is the boat deck? A. The boat deck is the top deck in the midship section of the vessel.

Q. Is that the deck that is already labeled on that plan, Libellant's Exhibit 2, as the boat deck? A. Yes, sir, that is.

Mr. Murphy: Referring to the profile plan marked No. 1.

Q. And where was the point you were ordered to lower them to? A. I was ordered to lower them to the level of the rail at the bridge deck or shelterdeck (indicating).

Mr. Murphy: Witness indicates the deck next below the boat deck.

Q. Did you execute that order? A. Yes, I did.

Q. Did you succeed in lowering all the lifeboats to that level? A. Yes, sir, I did.

Q. When that was done did you make any report to the master? A. Yes, sir, I reported back to the master and he told me to stand by the anchor windlass on the forecastlehead in preparation for weighing anchor.

Q. Did you take station on the forecastlehead at the anchor windlass? A. Yes, sir.

Q. Were you able to observe from there what went on
1415 after that? A. Yes, sir.

Q. Will you now say what occurred after you got up to the forecastlehead? A. After I had arrived on the forecastlehead and been there just a few minutes the *Portmar* was attacked by Japanese dive bombers in succession. The first dive bomber released his bomb so that from where I was it looked as though it were going to strike the vessel on the port side abreast of No. 4 hatch.

Q. Where did that bomb actually strike? A. Well, the explosion of the bomb looked from where I was as though it had struck the side of the vessel. I couldn't see from there because of the tremendous amount of water thrown
1416 up by it.

Q. Was it very close to the side of the vessel? A. Yes, sir.

Q. On this chart, Libellant's Exhibit 2, the master has placed a mark opposite the plan of the ship numbered 5 at the foot of the chart and it is labeled "First bomb February 19, 1942". Do you agree with that position as the position where the first bomb fell? A. Yes, sir, that is my recollection as to the location at which that bomb fell.

Q. Was it very close to the port side of the vessel? A. Yes, sir, it was.

Q. Did any other bomb fall near the *Portmar* after that? A. Yes sir, this dive bomber was followed almost immediately by another one and his bomb also landed on the port side.

Q. Landed on the port side at what point? A. From where I was it looked as though it landed immediately beneath lifeboat No. 4.

Q. And which is lifeboat No. 4? A. Lifeboat No. 4 is the after lifeboat on the port side.

Q. On this chart, Libellant's Exhibit 2, the master has placed another mark labeled "Second bomb February 19, 1942", that mark being apparently on the plan opposite the bridge area. Is that the approximate position of the second bomb which fell? A. My recollection was that the bomb was further aft than that. In other words, it would be between the position marked as second bomb and first bomb. 1418

Q. Will you describe what the explosion of those bombs did to the *Portmar* from your own observation? A. From where I was on the forecastlehead you could see that the two lifeboats on that side, one of them completely disappeared and the other one was torn asunder, the garboard strakes had pulled away from the keel, the lifeboat nothing but a few strips of sheet iron and keel.

Q. What effect did those explosions have on the midship accommodations and pilothouse windows? A. I could see glass fly from the windows as the bombs exploded and bits of the bulwarks around the bridge come flying out with the concussion. One of the No. 3 booms fell at the same time and this boom came down through the awning of the port side of the captain's deck. I could see that one of the booms No. 4 hatch had also fallen, crashed into the boat deck. 1419

Q. Did you later make an examination to determine further what effect those bombs had on the ship? A. Yes, sir.

Q. Will you describe more particularly the effect of those bombs from your later inspection? A. From my later inspection I found that all of the wooden sheathing or ceiling inside of the quarters in the midship section of the vessel had been pulled adrift right away from the bulkhead and ceiling and all the locker doors had been pulled apart as it were by the concussion and a great many

holes had been put in the vessel's superstructure by the cannon fire from the attacking planes.

Q. I am coming to that. In addition to these bombs which you have described on that occasion was there any attack by aerial machine gun and cannon fire? A. Yes, sir, these dive bombers while they were attacking were firing their machine guns continuously. Subsequently to the attack by the two dive bombers we were attacked by a number of fighter planes which also maintained a very heavy fire.

1421 Q. Were you standing by the windlass during all that attack? A. I was standing by the windlass with the exception of a short while during which I came back aft on the starboard side to clear away the wreckage from one of the lifeboats. The falls of this boat had been cut and it had fallen in the water and I came in to clear the falls but this boat had been riddled so by machine gun and cannon fire that it fell in the water. While I was there the other boat standing in the falls also had a good many holes in it and I cleared that.

Q. Were those boats on the port side or starboard side? A. They were on the starboard side.

1422 Q. Did you see anyone lower those lifeboats? A. No, sir.

Q. Did you have anything to do with lowering them yourself? A. No, sir, except the clearing of the wreckage in one.

Q. By clearing the wreckage do you mean lowering that to the water? A. No, sir, the boat that I spoke of the fall had been cut and it had fallen in the water. By this time the tide began to ebb and strong current running past the ship, this boat dangling in the water with one fall.

Q. Did you hoist that boat back up again? A. No, sir, I had to lower it in, couldn't possibly hoist it in.

Q. Did you lower it away? A. Yes, sir, lowered it away.

Q. After that did you finally return to the forecastle-head? A. Yes, sir.

Q. What was the effect of this aerial machine gun and cannon fire on the decks of the vessel? A. The effect of the cannon fire was to riddle all of the boat deck, the captain's deck, it was powerful enough to drive through the steel decks in the amidship section of the vessel in a number of places also. The cannon fire would tear a big—whether one bullet or not—it would tear a hole that you could stick your head through when it struck the wooden deck, four-inch deck.

Q. Was there any effect on the radio shack and hospital? A. Yes, sir, the radio shack and hospital were in one house 1424
made of wood, and they seemed to be directly in line of fire of these cannons. It was in perhaps the worst condition of any of the quarters in the house amidships.

Q. What was the effect of the aerial fire or the bomb explosions on the standing and running rigging of the vessel? A. As I said before, the cannon fire had cut the boat falls, damaged them seriously. It also cut a great many of the shrouds, topping lifts and the booms, the guys of the booms—in two cases two of the booms topping lifts were cut through and they fell down, the others the majority of them were damaged to some extent, the jumbo boom guys, for example, were broken, they were seriously damaged as to be of no further use at all. 1425

Q. Was that jumbo boom you refer to the thirty-ton boom at No. 2? A. Yes, sir, it was.

Q. Did you say that the rigging of that boom had been damaged? A. Oh yes, sir, it was.

Q. When did this attack cease? A. The attack by dive bombers and fighter planes on the *Portmar* as I recall it ceased about 11 o'clock.

Q. And when that occurred did you receive any order from the captain? A. Yes, shortly after that attack had ceased the captain ordered me to weigh anchor.

Q. Did you do that? A. Yes, sir.

Q. Did you have any help? A. Yes, sir, I had the carpenter with me in the bow.

Q. Did you have steam on the windlass to perform that operation? A. Yes, sir, we did.

Q. Was there any effect of the aerial gun and cannon fire on the deck steam lines? A. Yes, sir, the deck steam line where it passes around No. 3 hatch had been punctured by this machine gun fire and the chief engineer had to make temporary repairs to it before we could do anything as this steam line supplied the windlass.

Q. Did the chief engineer effect sufficient repairs to enable you to get steam to the windlass? A. Yes, sir.

1427 Q. Did you raise the anchor with the windlass? A. Yes, sir.

Q. After the anchor was aweigh did you give any signal to the master indicating the anchor was up? A. Yes, sir, I did.

Q. After that did the vessel get under way? A. Yes, sir.

Q. Do you recall in what direction the vessel proceeded? A. The vessel proceeded down the Middle Arm towards the south.

Q. Was the vessel towing anything as she moved down the Middle Arm? A. Yes, sir, we had a number of make-

1428 shift life rafts we had put in the water when the attack began and those were made fast alongside the ship.

Q. In your observations of the condition of the vessel after the second attack did you observe the condition of the compasses? A. Yes, sir, as we were proceeding down after the anchor had been weighed and we were proceeding down the harbor the master called me to the bridge and told me that we were, that he was going to take the ship down the Middle Arm and anchor it as close as possible to a small island down that Arm so we could disembark the troops and he asked me to help in the navigation of the vessel by taking anchor bearings—not anchor bearings, I meant to say by taking bearings.

Q. Where did you go to take those bearings? A. I went to the standard binnacle which is located on the top of the wheelhouse.

Q. Is that the topmost deck of the vessel? A. Yes.

Q. On Libellant's Exhibit 2 there is an arrow pointing to a spot called compass bridge—was that the point where you went? A. Yes, sir.

Q. How did you find the standard compass when you got there? A. I found that the compass had been so badly damaged by the attack I could not possibly take any bearings on it. The glass was broken.

Q. Did you report that condition to the captain? A. Yes, sir.

Q. Did he come up and look at it? A. I don't know 1430
whether he did or not.

Q. After that what happened? A. After that we continued on down the Arm.

Q. Let me ask you, after that did you go down into the navigating bridge one deck below? A. Yes, sir.

Q. Did you see the navigating compass of the ship? A. Yes, sir.

Q. What condition was that in? A. That was in virtually the same condition as the standard compass. It could not be used at all because of the damage to it by machine gun fire and cannon fire.

Q. At this point let me ask you, did you observe any 1431
effect of aerial gun fire on ship's gear on the poop? Did the vessel have a poop mooring telegraph? A. Yes, sir.

Q. What was the condition of that? A. I had not been on the poop deck at that time.

Q. But later did you make an inspection? A. Yes, sir.

Q. And how did you find the poop mooring telegraph? A. I found that it had been damaged too. In fact there was hardly any place on the ship that had not been damaged to some extent by the cannon and machine gun fire.

Q. Was there a sounding machine on the ship? A. Yes, sir.

Q. What was the condition of that after the aerial attack? A. That had also been damaged.

Q. Did you observe the ship's refrigerating compartments and ice machine at a later time? A. Yes, sir, at a later

Q. Did any other craft come near the *Portmar*? A. Yes, sir, a small vessel belonging to the Royal Australian Navy came alongside shortly after we had begun to disembark the soldiers and began to assist us.

Q. What kind of assistance did she give? A. She just disembarked the soldiers.

Q. Was there any other trouble with fire on the ship? A. Yes, sir. Some time after that the fire broke out again.

Q. In what hold? A. No. 4 lower hold.

Q. What did you do? A. I again went into No. 4 lower
1439 hold and located the fire and put it out.

Q. Where was the fire? A. It was located in some more of the Army's tentings which was being carried in that space.

Q. While you were in the hold did you make any observation as to the entry of water into the vessel? A. Yes, sir, in the meantime the vessel had taken a port list and therefore more of the port side of the vessel being under water some of the holes that were above the water were now taking water very fast.

Q. Did you later find out anything about the port deep tank? A. Yes, sir, I later learned that the port deep tank had also been punctured.

1440 Q. Was water entering the port deep tank also? A. Yes, sir.

Q. Did you succeed in getting the fire under control? A. Yes, sir.

Q. Did you report to the master after that operation? A. Yes, sir, after that operation I reported to the master telling him that the vessel was making water a good deal faster.

Q. In what hold? A. Nos. 4 and 5 lower holds.

Q. After that what did the vessel do? A. Well, after that the captain told me to weigh anchor and told me that we were going to beach the vessel to try and prevent her sinking.

Q. Did you go to the forecastlehead? A. Yes, sir, I did.

Q. Did you weigh anchor? A. Yes, sir.

Q. Where did the vessel go then? A. The vessel proceeded just south of Channel Island at a slow speed.

Q. While you were so proceeding did the captain give you any orders as to navigation? A. Yes, sir, he asked me to the bridge to help him con the vessel because of the compasses being out of order and having nothing to steer by but landmarks.

Q. Did you go to the bridge? A. Yes, sir.

Q. How did you help him con the vessel? A. As I remember we used a lead line while we were beaching the vessel. 1442

Q. Did you make any observation of anything as you went along? A. Well, we had nothing but the hills in the distance, small rise of ground on Channel Island to go by.

Q. Were you looking at anything with respect to the water in order to determine depth? A. Yes, sir, we were using lead line.

Q. Did any other craft come to the *Portmar* to assist in disembarking troops? A. Yes, sir, while we were proceeding towards the shore to strand the vessel another small Australian naval vessel came alongside and moved the remainder of the Army personnel from the *Portmar*.

Q. Was the vessel under way at that time? A. Yes, sir. 1443

Q. Did the vessel take ground after that? A. Yes, sir. just after the soldiers had been disembarked we grounded.

Q. At what point did the vessel ground? A. The vessel grounded just to the south of Channel Island.

Q. On the chart, Libellant's Exhibit 4, the master has placed a point labeled "*Portmar* stranded 2.12 P. M. February 19, 1942". Does that represent the point where the vessel stranded? A. Yes, sir.

Q. And as to the time of stranding, what record have you of that? A. His time of stranding is the same as I have, sir.

Q. What is your time? A. 2.12 P. M.

Q. After the vessel was beached what did you do? A. As soon as the vessel was beached we began at once to try to stop the inflow of water in the vessel. We still had one of those homemade life rafts alongside and I put the carpenter in one and he was seated on that with axes and blocks of wood to drive plugs in the holes from the outside of the vessel. The remainder I went into No. 4 and 5 holds myself with axes and hatchets and blocks of wooden wedges and bags, sacking, to plug the holes from the inside of the vessel.

1445 Q. How did the vessel lie in her beached position? A. Right after she was beached she maintained a port list which she had before with her head towards the east.

Q. Under what part of her hull was she aground? A. She was aground under the stern.

Q. Which side? A. Starboard side.

Q. In about how much water there? A. I don't know.

Q. Were any soundings taken? A. Yes, sir, soundings were taken.

Q. Have you any record of the soundings? A. No, sir.

Q. Did the list of the vessel to port increase any after you beached the vessel? A. Not immediately after, no. Shortly after 5 o'clock it began to increase.

1446 Q. What was the action of the tide during the afternoon? A. When we beached the vessel the tide was still falling.

Q. As the tide went down what was the effect on the vessel? A. She remained at almost the same list for some time. As I said before, after 5 o'clock the list began to increase considerably.

Q. And to what extent did the list increase? A. Well, it increased to such an extent that after 5 o'clock it was difficult to get from the port side of the ship to the starboard side unless you had something to hold onto to help yourself across.

Q. What effect did that have on the intake of water into the vessel through the holes caused by the enemy attack?

A. That caused all of the holes on the port side to be submerged.

Q. In plugging the holes during the afternoon how many holes did you succeed in getting plugged? A. Well, we did not count them but as I said before we had two men on the outside of the vessel and anywhere from two to four other men and myself in the hold and we were continually making the plugs out of wood and driving them into those holes I should say from about 2.15 or 2.30 until we finally left the vessel because of the great list.

Q. Did you succeed in getting all the holes plugged up? 1448
A. No, sir, some of them were in behind the cargo or behind web frames and parts of the structure of the ship and we couldn't get at them.

Q. Did any vessel come alongside the *Portmar* at about 6 o'clock? A. Yes, sir, one of the small Australian naval vessels came alongside.

Q. Did anyone from that vessel come on board the *Portmar*? A. Yes, sir, the commander of that vessel boarded the *Portmar*.

Q. After that did the captain issue any order to you? A. Yes, sir, after that the captain told me to take my men out of the hold and to take them on board the small vessel that was alongside. 1449

Q. Did the captain issue any order to the chief engineer? A. Yes, sir, I was there when he told the chief engineer to release the steam from the boilers and cut out his fire.

Q. And then do what? A. And then leave the vessel.

Q. Did you go on board the Australian vessel alongside? A. Yes, sir.

Q. Did your men go with you? A. Yes, sir.

Q. Did any remain on board the vessel? A. No, sir.

Q. How about the engineroom force? A. They all left the vessel, sir.

Q. Did the captain give you any instructions after you got on board the Australian vessel? A. Yes, sir, after we

boarded the Australian vessel Captain Michelson told me that I was to go with the men to Darwin and to keep the men together as far as I could.

Q. At the time you left the *Portmar* was there any indication as to what might happen to the *Portmar*? A. Yes, sir, I was afraid the *Portmar* would roll over on the port side.

Q. Before you left the *Portmar* did you go anywhere on the ship with the captain? A. No, sir, I did not go anywhere.

1451 Q. Did you see anyone take any action with respect to an anchor of the *Portmar*? A. Yes, sir, I did.

Q. What did you see? A. I saw Captain Michelson let go the anchor.

Q. Which anchor? A. The starboard anchor if I recall.

Q. Are you sure? A. No, sir, I am not positive. I did see him let go an anchor.

Q. By that are we to understand that you are not sure which anchor it was? A. No, sir, as I recall I was in the—I had already boarded this small Australian vessel. That was the last act that Captain Michelson did before he left the vessel and from this small boat I could not see just

1452 which anchor he had let go.

Q. When you and your deck force and the deck engineer and his engine force were on board the Australian craft—by the way, what was the name of that craft? A. As I remember it was the *Vigilante*.

Q. While you were there where did the captain go? A. Well, the captain boarded the small motor launch Nevbet.

Q. Did he have anyone with him? A. Yes, sir, he had the boatswain and the carpenter and one able seaman with him.

Q. And what did the Vigilante do with you on board? A. The Vigilante proceeded out into deeper water where there was another Royal Australian naval vessel and all of the uninjured of the *Portmar's* crew who had been aboard the Vigilante boarded it and the Vigilante's com-

mander told me that he was taking the injured men to the hospital ship.

Q. And did you go on board this other ship? A. Yes, sir, I did.

Q. What did the Nevbet do with the captain and these three men on board? A. The Nevbet remained standing by the *Portmar.*

Q. Where did this other ship take you and your crew? A. She took us to Darwin.

Q. On landing at Darwin what did you do? A. On landing at Darwin I with the remainder of the crew 1454
reported to the headquarters of the United States Army.

Q. And what happened then? A. They provided us with transportation which carried us to a camp about seventeen miles south of Darwin.

Q. I omitted to ask you, during all this day February 19, 1942 what were the weather conditions? A. The weather conditions were fine and clear.

Q. Was there any wind? A. Very little.

Q. How was the surface of the water in the Bay? A. Calm.

Q. On arrival at the camp of the 147th Field Artillery —by the way, how far was that from Darwin? A. About 1455
seventeen miles.

Q. What did you do? A. Well, we arrived there as I recall it, after midnight., Someone in authority distributed us among three or four kitchens and brought out the cooks for the Army and they gave us something to eat and then we found a nice soft spot to sleep.

Q. What did you do that next day, February [illegible]? A. February 20th I obtained transportation from one of the Army officers of the Quartermasters Corps there and he took me back down to the port area at Darwin and I made an effort to get a boat to take me down to the *Portmar* as I knew Captain Michelson was still there.

Q. Did you succeed in getting down to the *Portmar*? A. No, sir, while I was there there was an aerial alert and all

the small boats when there is an aerial alert there they proceed as far from the port of Darwin as they could and hide in the mangroves, so I couldn't get a boat.

Q. What did you do then? A. After trying by all means to get a boat, the latter part of the day I returned to the Army camp.

Q. What did you do the next day, February 21st? A. February 21st I came back to the port area at Darwin and there I found a Colonel who was in charge of the regiment whose equipment we had aboard the Portmar and whose

1457 men we had on the *Portmar*.

Q. What was his name? A. As I remember it was Petterson.

Q. Go ahead. A. Colonel Petterson said that he was going down to the *Portmar* and that he had a launch and he would be glad to take me down.

Q. Did you go with him in that launch? A. Yes, sir.

Q. Was anyone else on board that launch? A. Yes, sir, there was a Captain Williams along with him.

Q. Did you see Captain Michelson after that? A. Yes, sir, when we arrived off Channel Island we found Captain Michelson aboard the launch *Nevvet*.

1458 Q. What did he do? A. He boarded the motor launch we were in and we all went together.

Q. Did you go on board the *Portmar*? A. Yes, sir.

Q. Did the captain go on board the *Portmar*? A. Yes, sir.

Q. Did anyone else go on board the *Portmar*? A. Yes, sir, Colonel Petterson and Captain Williams also came aboard.

Q. Did you make an examination of the vessel? A. Yes, sir.

Q. What did you find? A. I found that Nos. 4 and 5 holds and the engineroom completely flooded with water, that the quarters of the poop deck under the poop deck of the vessel were flooded, that the oil in the double bottom tanks had overflowed through the pipes and adhered to

every part of the vessel's superstructure that was above water either at low or high tide, every part of the vessel rather that was touched by the tide.

Q. Is the *Portmar* an oil-burning vessel? A. Yes, sir.

Q. With steam engines? A. Yes, sir.

Q. And at the time of the bombing attack of February 19th did she have fuel oil in her double bottoms? A. Yes, sir, she did.

Q. When you said the accommodations in the poop were flooded, where was the water level of the Bay? A. As I remember it the water level was not quite to the top of the 1460
poop deck throughout but the vessel had a port list and one could see by the line of oil that by high tide it came within I should say three feet of covering the poop deck on the starboard side, which would mean that the poop deck quarters were flooded.

Q. At about what time was it that you four went on board the vessel on the night of the 21st of February? A. I don't remember exactly what time but it was sometime very near to noon, 12 o'clock.

Q. On February 21st? A. Yes, sir.

Q. And how was the tide at that time? A. I don't remember exactly.

1461

Q. Did you and the master and the Colonel and Captain Williams go all over the ship as far as you could? A. Yes, sir, I was with Colonel Petterson and Captain Williams while they were making their examination of the vessel.

Q. Was there any discussion during that examination as to what was to be done? A. Yes, sir, Colonel Petterson who was in charge of the regiment to which that equipment belonged was very interested in getting it put back ashore.

Q. Where were the guns stowed on the *Portmar*, the guns belonging to that regiment or detachment that was on board the *Portmar*? A. All the guns were stowed in No. 4 lower hold with the exception of the machine guns which had been mounted on deck, and some of their spare parts.

1462 *Deposition of Joseph E. Bullock—Direct.*

Mr. Mount: May I interrupt just a second. Will you get the witness to explain what he means by No. 4 and No. 5 holds because the plan only shows 1, 2, 3 and 4.

Mr. Murphy: Right.

Q. Now, Captain Bullock, will you look at the plan, Libellant's Exhibit 2, and tell us what you mean by Nos. 4 and 5 holds? A. This is something I run into every time. On this type of ship we have always called this No. 1 as on
1463 the plan, this No. 2——

Q. As on the plan? A. As on the plan—this No. 3 (indicating).

Q. No. 3, pointing to cargo or fuel oil deep tank? A. That's right, but we speak of that as No. 3 hold, and this is No. 4 and 5 (indicating).

Q. Then 4 and 5 are the next succeeding holds after the engine space? A. That's right.

Q. Suppose we mark this as you have indicated with a large pencil figure "No. 4" and "No. 5"— is that right? A. That's right.

Q. Now, it is pointed out that in the plans down below, Nos. 3, 4 and 5, that is the plans being numbered that in ink
1464 for identification, we have No. 3 hatch and No. 4 hatch and we have a label "Hold No. 3". Are we to understand that you disregard that designation? A. I do.

Q. And you call that hold No. 4 and hold No. 5? A. That's right.

Q. And that hatch No. 3 goes into No. 4 hold? A. That's right.

Q. And hatch No. 4 goes into No. 5 hold? A. That's right.

Mr. Mount: Yes, we so understood it but we wanted it on the record.

Q. That being so, you say the field pieces were stowed in No. 4 hold? A. That's right.

Q. That is the hold next aft of the engineroom? A. Yes.

Q. Were those field pieces under water when you four made your inspection on February 21, 1942? A. Yes, sir, they were.

Q. Did you hear anyone say anything on that occasion about salving the vessel itself? A. No, sir.

Q. What was the condition of the engineroom at the time of your examination on February 21, 1942? A. I remember going to the engineroom door.

Q. And what did you see? A. And looking down into the engineroom. The water was almost to the top of the main engine cylinders. 1466

Q. How far is that above the engineroom floor plates? A. Well, I don't know just how far that is above but it is about one deck below the level of the maindeck, I should say seven feet perhaps below the level of the maindeck.

Q. Can you estimate for us the approximate height of that water in the engineroom if it reached the tops of the cylinders? A. It would be about this height (indicating on Libellant's Exhibit 1).

Mr. Murphy: Witness draws a pencil line on the deck above the words "Engineroom space" on Libellant's Exhibit 1. 1467

Q. Are you able to estimate the height above the floor plates of that line approximately? A. Well, it is drawn there in that plan measuring in the plan between sixteen and seventeen feet above the tank top.

Q. After that what did you do? A. After that I returned to Darwin with Captain Michelson and Colonel Petterson in the motor launch.

Q. And what did you do then? A. I accompanied Captain Michelson while he went to see the Senior United States naval officer at Darwin and while he went to see the Senior officer of the United States Army at Darwin.

Q. Did Captain Williams return to Darwin with you? A. No, sir, he remained on the *Portmar*.

Q. What transportation did he have? A. Well, near the situation of the *Portmar* there were several small craft of the Royal Australian Navy at anchor. He was associated in some way with them.

Q. What time of day was it when you left the *Portmar* to go back to Darwin? A. I don't remember the exact time but it was in the afternoon.

Q. On February 22nd did you return to the *Portmar*, the next day? A. I can't remember the exact dates now.

Q. Well, let me ask you did you go back to the *Portmar*
1469 after that visit of February 21st? A. Yes, sir, I did.

Q. Do you remember what date it was that you got back there and what you did when you got there? A. I do remember going back there with the launch *Nevbet*.

Q. And who was with you? A. Captain Michelson and one of the seamen.

Q. And what did you do when you got there? A. The seaman and I loaded the launch with bedding and personal belongings of some of the soldiers that had been on the ship and carried them back to Darwin where we delivered it to the United States Army and later on on that same day we returned to the *Portmar* where Captain Michelson remained
1470 taking with us some of the officers of the regiment to whom the equipment belonged.

Q. At that time was anything being done with regard to the cargo in the *Portmar*? A. Yes, sir, on that evening the Royal Australian Navy began to salvage under direction of Captain Williams the cargo of the vessel. They brought alongside a number of lighters and one of the auxiliaries of the Royal Australian Navy began to unload the equipment that was in the forward of the vessel.

Q. Was that work done in daylight or in darkness? A. No, sir, they only worked in darkness.

Q. Why? A. They were afraid of another Japanese aerial attack.

Q. Were there any aerial attacks on any of those visits you made to the *Portmar* on the harbor? A. I did not see

any aerial attack but I know there were several occasions on which reconnaissance planes came over, and there were alerts. I was present in the harbor on one of the dates when they had an alert.

Q. While you were ashore on those occasions did you see any indication of preparations to repel a Japanese invasion? A. Yes, sir, they had a large barricade built on the highway just outside of Darwin that extended as far as you could see from the highway and all of the civilian shops had been closed up and civilians had been evacuated from Darwin. The only authority there was the Allied military. I remember on one occasion going with Captain Michelson to the 1472 headquarters of the military authority there to obtain passes.

Q. Returning to the events of that day when you took the bedding and that personal property ashore and then went back to the *Portmar* with some officers of troops that had been on board, are you able to give us the date on which that was done? A. As I recall that was on the 23rd.

Q. Did you remain on the vessel that night? A. Yes, sir, we remained on the vessel that night.

Q. And what happened the next day? A. The next day we returned to Darwin.

Q. Was Captain Williams there on the vessel, the 1473 *Portmar*, on February 23rd? A. Yes, sir, he was there supervising the unloading of the Army equipment.

Q. Were they unloading any of the field guns from No. 4 hold that day? A. No, sir, they were not doing that, they were working in the part of the ship that was above water.

Q. What part of the ship was that, running from what point? A. They were working in No. 1 and No. 2 holds, that was forward of the midship section.

Q. Did the master give you any instructions as to working with Captain Williams or to assist him in any way? A. Yes, sir, he told me to show Captain Williams anything that I could show him, where the spare blocks and wire and

rope and equipment were stowed in the forepeak of the vessel, and I was there when they were rigging up some booms, they had to reeve off fairleads for the blocks so that they could run the hoisting wires under the auxiliary that was helping unload the vessel.

Q. Where was that auxiliary? A. During the daytime she hid herself somewhere in the mangroves in one of the Arms of the harbor but at nighttime she would go alongside either the port side or starboard side of the vessel.

Q. By that you mean it was another craft that had an
1475 engine on board that was being used? A. Yes, sir.

Q. And was that engine being used to operate the falls for hoisting things out of the hold of the vessel? A. Yes, sir.

Q. Did you assist Captain Williams in making those arrangements? A. Yes, sir, I did.

Q. As I understood you, you remained that night. On February 24th what did you do? A. On February 24th we returned to Darwin.

Q. Did you stay in the town of Port Darwin? A. No, sir, we returned to the camp where the crew of the *Portmar* was staying.

1476 Q. On that date did anything happen with respect to any other vessel? A. On returning to the camp that evening it was quite late and very few of the crew were there and they told us that the Senior officer of the United States Army had asked them to volunteer to help in unloading another vessel that was in the port. The men had volunteered and as a result the only men at the Army camp were the men who——

Q. What was the next date you saw the *Portmar*? A. The next date as I remember was March 2nd.

Q. In between the night of the 24th and March 2nd what were you doing? A. I was assisting in loading and unloading vessels in the port.

Q. At whose orders? A. The orders of the United States Army.

Q. Was one of those vessels a ship called the *Admiral Halstead*? A. Yes, sir.

Q. Tell us what happened on March 2nd. A. On the evening of March 2nd Captain Michelson, the chief engineer and myself went down to the *Portmar* with the salvage crowd, with the men that were going to salvage the cargo.

Q. Was Captain Williams with you? A. No, sir, he was not with us on the boat that took us down but he was down there.

Q. He was down there when you got there? A. Yes, sir.

Q. What was the condition of the vessel as you found her on that occasion? A. She was very near to the same condition only that her stern seemed to have settled more and she had a little more of a list as though the vessel's stern was sinking in the mud and we found that all of the Army equipment forward in the ship or almost all of it I should say had been removed. In addition to that a great deal of the ship's equipment had been removed—you might say everything of any value in the way of rope, paint and all this equipment, tools and ship's stores. 1478

Mr. Collins: Had been removed?

The Witness: Yes.

Q. Did you inquire as to who removed that portable property? A. Yes, I inquired of the Army officers and they told me that the Australian Navy had removed everything. 1479

Q. While the ship was lying there on the beach in the position as you found her on March 2nd what was the effect of the rise and fall of the tide on the vessel? A. As I said before, the stern of the vessel was the part that was aground, resting on the bottom, but the forward end of the ship was still afloat so that as the tide rose the bow of the ship would rise, as the tide came down the bow came down.

Q. What effect did that appear to have on the structure of the vessel? A. That appeared to have an effect of putting a severe strain on the structure of the ship.

Q. What was the extent of rise and fall of the tide in Port Darwin at that time and at that point if you observed it, do you know? A. As I remember about that time the tide, it was Spring tide, they were extreme, they had the biggest rains—I don't remember the exact footage but it was somewhere between twenty and thirty feet, nearer thirty than twenty.

Mr. Collins: This was Spring down there?

The Witness: Yes.

1481 Q. Did you remain on board the *Portmar* overnight of March 2nd-3rd? A. Yes, sir, I did.

Q. What did you do on the 3rd of March? A. The morning of the 3rd of March we returned to Darwin, were taken back to the Army camp.

Q. Was anything done on March 3rd as to inquiries made by Captain Williams as to the vessel? A. I believe it was on the evening of March 3rd the Army camp at which we were staying brought me information that Captain Williams wanted to see some of the ship's personnel with regard to the vessel.

Q. And what did you do? A. That evening the chief
1482 engineer and myself went into Port Darwin and were taken out to see Captain Williams aboard one of the Royal Australian naval vessels on which he was staying.

Q. I omitted to ask you this about the height of the tide and the effect on the *Portmar:* At high tide what was the level of water with relation to the deck of the *Portmar*? A. At high tide the poop deck of the *Portmar,* which is the highest deck on the stern of the ship, was submerged except for a very small bit on the starboard forward corner, which was the highest corner the way the ship lay, and the high water mark amidships was on the port side just the corner of the coaming of the port after shelterdeck door, so that the openings of Nos. 4 and 5 hatches on the maindeck were under water.

Q. Now will you please continue with what you did when you were told that Captain Williams wanted to see somebody about the ship? A. The chief engineer and I obtained transportation to the port and were taken out to see Captain Williams, as I said before. He was particularly interested in the extent of damage to the shell of the vessel.

Q. Where was he? A. He was on board a corvette belonging to the Royal Australian Navy which was anchored near the *Portmar*.

Q. Did you speak with him on board the corvette? A. Yes, sir, I did.

1484

Q. What particulars did he ask you for? A. He asked me if I knew the exact extent of the damage to the shell of the vessel, he told me that he was trying to plug these holes up and so far he had not succeeded and he thought that we might know of some serious damage or hole which he could not see from the surface.

Q. Did Captain Williams or anyone else ever say anything to you about salving the ship itself? A. No, sir, he only discussed the cargo.

Q. What cargo was he talking about then? A. He was talking about the guns and field pieces that were stowed in No. 4 lower hold.

Q. Were those field pieces still under water? A. Yes, sir.

1485

Q. Do we understand that this conference took place on March 3rd? A. Yes, sir, it did.

Q. Did you do anything else that night? A. I remained on board one of the small naval vessels the remainder of that night.

Q. What did you do on March 4th? A. On March 4th I returned to Darwin.

Q. Did you ever see the *Portmar* again after you left her on March 4th? A. No, sir.

Q. Did the captain stay there on the night of March 3rd-4th with you? A. No, sir, he was not there, it was just the chief engineer and myself.

Q. So that the morning of March 4th was the last time you saw the *Portmar*? A. Yes, sir.

Q. Did you form any judgment when you last saw the *Portmar* as to the possibility of raising the vessel, salving her, repairing her, re-equipping her and restoring her to the condition in which she was prior to the first bombing attack in the Timor Sea on February 15th and 16th, 1942? A. No, sir, I saw no hope at all then.

Q. I am asking you if you formed a judgment on that subject—did you form a judgment or an opinion, and if so
1487 what was your opinion? A. Yes, sir, my opinion had been formed on that day and the day previous. It appeared to me that the *Portmar* in her present situation was hopeless as far as salvage and repair and reconditioning was concerned.

Q. When you got back to the Army camp on March 4th what did you find? A. On March 4th I found that the men were still being employed as stevedores. The majority of them were getting disgruntled, grumbling about the work they were doing, they all or nearly all had the opinion that they were being held in Darwin just because they were working as stevedores for the Army and therefore valuable, but
1488 they were still working.

Q. After that did they do any more stevedoring work? A. Yes, sir.

Q. Until when? A. As I remember, they worked until the 7th. They worked on the last occasion from midnight until daylight the morning of the 7th.

Q. And what occurred then? A. Well, sometime in the afternoon of the 7th I had been trying to get a little rest during the days—I had worked that night—word was brought to me through one of the sergeants in the camp that they wanted a detail to work again that night starting at sunset. As in the past I went to the men and told them that the Army wanted a volunteer detail of fifteen men to work that night and only three of them volunteered. It so happened those three had not worked the night before so

they were still fresh. I went back and told the Army sergeant who had been asking for the volunteers that only three men volunteered. He said something to this effect: "Well, if they don't go to work tonight they better not come to the kitchen and get their supper."

Q. Did Captain Michelson take any action with regard to that situation? A. Captain Michelson heretofore left the details entirely up to me. If they asked for men I went to the men and the men had volunteered in the presence of the Senior Army officer, American Army officer there, to work in the past so I just went to the men and told 1490
them they wanted a detail and arranged which would work that night and that was all there was to it, but on this occasion after I told the sergeant that only three men volunteered to work it wasn't very long before the Adjutant of the camp, who was a captain by the way, came to our tent and asked Captain Michelson "How about it, don't I get a detail of fifteen men tonight?" and Captain Michelson said that he was not going to order them to work, if they volunteered that was entirely up to them, so then the captain told them that if they did not volunteer he would see they worked the next day under an armed guard at the point of a gun but that he would not force such a thing on the 1491
captain or his officers. Captain Michelson told him he did not expect any better treatment than his men got. With that the Army captain departed.

Q. What happened the next day? A. Well, before the next day, in fact it was but a short while before one of the lieutenants came to the tent in which the captain and myself and the chief engineer and the first assistant were sleeping and told us that we were all to be put in a restricted area under an armed guard so we all decided to leave our tent and live with the men in their tent. The camp was to be in their area. We all repaired to this one area and the Army placed sub-machine guns around the area we were in and they removed all our personal effects which might be dangerous—I remember they took my

straight razor—and they brought us our food and we were allowed to have a campfire as we had our cooks and stewards with us and they did the cooking. We did not fare so bad but we were kept in this one area, all but the three men who had volunteered the last night they asked for volunteers and two or three other men who had been doing their day's work in the camp kitchen instead of the port area on the ships.

Q. Was Captain Michelson there in that confined space with you? A. Yes, sir, he was confined with the rest of us.

1493 Q. How long did that confinement last? A. That confinement lasted until we received orders to entrain for Melbourne.

Q. When were you put on the train for Melbourne? A. As I remember it was March 10th in the afternoon.

Q. What kind of cars did you go on? A. The train consisted of open gondolas and cattle cars for the most part.

Q. Where did that train take you? A. That train took us south to the end of the line, a little stop called Birdum, I believe.

Q. How long did that run take? A. We left there on March 10th and I think it was the morning of the 12th we arrived in Birdum, very early.

1494 Q. Are we to understand the master was with you then? A. Yes, sir, he was.

Q. And all your crew except the casualties? A. Yes, sir.

Q. What happened at Birdum?

Mr. Collins: Do we have to go through all this?

Mr. Murphy: There was one thing I am coming to, yes.

Mr. Collins: It doesn't seem to me it makes much difference how they got to Melbourne. I object to it as encumbering the record.

Mr. Murphy: I am examining on things I think are material.

Mr. Collins: Well, if it is material I will withdraw my objection.

Q. Where did you go from Birdum? A. From Birdum we were taken in motor trucks, freight trucks, across the intervening space between the railroad head at Birdum and the railroad head at Alice Springs.

Q. What kind of a space is that you went through in those trucks? A. It is mostly desert space.

Q. How long a run was that? A. We got into these trucks on the afternoon of March 12th and I think we arrived at Alice Springs on the 15th of March. 1496

Q. Do you know how far that was across the desert from Birdum to Alice Springs? A. I don't remember the exact mileage.

Q. Can you give us an approximation? A. I think it was seven or eight hundred miles.

Q. At Alice Springs what did you do? A. At Alice Springs after we waited two days we were put aboard the train there and proceeded south to Melbourne.

Q. What day was it you left Alice Springs? A. I think it was on March 17th.

Q. While you were going on the railroad train from Alice Springs to Melbourne did you see anything in the way of gear which might be used to help the *Portmar*? A. Yes, sir, we did. I remember somewhere between Alice Springs and Adelaide we came into a small siding, a little town there, and as we came into this siding I noticed an open gondola car that had some big centrifugal internal engine combustion driven pumps in it. This was on a train which was bound the other way. 1497

Q. What did you do? A. While we were laying at that siding, being interested of course in pumps and salvage and so on and I knew Captain Williams was trying to raise the *Portmar*, I got out of the car we were in and went back and looked at these pumps and found that there were two of them and they both had labels on them addressing them to Captain Williams at Port Darwin.

Q. Are you able to give us the dimensions of the intake or discharge of those pumps in inches? A. No, sir, I don't think so. As I remember, one of them was quite large and I would judge to the best of my recollection perhaps a ten-inch opening. The other one was a little smaller.

Q. Did the label say where those pumps had been shipped from, what point? A. I don't remember that.

Q. Did you report to Captain Michelson what you had seen? A. Yes, sir, I immediately told Captain Michelson about it. We discussed the matter.

1499 Q. When did you arrive at Melbourne? A. We arrived at Melbourne as I remember on March 22nd, Sunday morning.

Q. Did the Captain thereafter note protest and extend the protest? A. Yes, sir, the following morning I proceeded with him to the American Consul at Melbourne where he noted protest.

Q. I show you Libellant's Exhibits 8 and 10 for identification and ask you with respect to Exhibit 8 if your signature appears at the foot of the protest, "Joseph E Bullock" under the signature of Axel Michelson? A. Yes, sir.

Q. And likewise on Exhibit 10 I ask you if your signature appears on the last page at the foot of the protest
1500 under the signature of Axel Michelson? A. Yes, sir.

Q. Were arrangements made for your transportation with your crew back to the United States? A. Yes, sir.

Q. What date did you leave Melbourne? A. I left Melbourne on April 6th.

Q. When did you arrive in San Francisco? A. I don't remember the exact date now. I think it was the 24th.

Q. April 24, 1942? A. I think so.

Q. While you were around the *Portmar* did you ever hear Captain Michelson or anyone else say that the back of the vessel was broken? A. No, sir, I did not.

Q. Did you ever say that yourself? A. No, sir.

Q. On your way back to San Francisco did you carry any of the ship's papers with you from Melbourne? A. Yes, sir, I carried the ship's articles and the official log.

Q. What did you do with the official logbook? A. I was required to deliver that to the United States Shipping Commissioner at San Francisco when we paid the crew off.

Q. Did you deliver it to the United States Shipping Commissioner at San Francisco? A. Yes, sir.

Q. Was the official logbook in Captain Michelson's handwriting? A. Yes, sir.

Q. I show you what purports to be a photostat copy of certain pages of the official logbook, offered here as Libellant's Exhibit 34 for identification. Looking at what appears to be page 10, does your signature appear there? 1502
A. Yes, sir.

Q. Under the signature of Cumber, chief engineer? A. Yes, sir.

Q. And on page 11 is your signature there under the signature of Axel Michelson? A. Yes, sir.

Q. Likewise on pages 12 and 15? A. Yes, sir.

Q. And 18? A. Yes, sir.

Q. During all the period from November 21, 1941 until your return to San Francisco April 24, 1942—by the way, what date did you arrive in New York, do you remember? A. You mean overland from San Francisco?

Q. Yes, after arrival at San Francisco. A. I don't remember the exact date. 1503

Q. Was it about a week later? A. I should say it was more—ten days or two weeks.

Q. At any rate, for the entire period from November 21, 1941 until you arrived in New York who paid your salary? A. The Calmar Steamship Corporation.

Cross examination by Mr. Mount:

Q. Captain Bullock, there are just a few details I would like to clear up. In the protest which you signed I think you stated that there was no leaking of the *Portmar* from the bombing in Timor Sea on February 16th, is that correct? A. The soundings showed none.

Q. Do I understand that you found two fires in No. 4 hold and one in No. 5? A. No.

Q. What were the facts? A. As I remember, all the fire was in No. 4 hold, that is the one just abaft—however, the 4 and 5 holds are one hold in that ship. In other words, the bulkhead is pierced.

Q. But there were two instances of fire in No. 4 hold? A. There were two instances in which I went down in the hold and put fire out, yes.

Q. And I understand your testimony to be that those were gotten under control in fairly short time? A. Yes.

Q. Have you any recollection how long it took to get
1505 them under control? A. I didn't look at any watches so I have no recollection, but I do know that in both instances the fires were inside of what they call an ammunition trailer and these trailers had been loaded with ten-inch and all kinds of combustible Army equipment and then they had been covered with canvas covers with the rack stuck in, so we had to rip off those canvas covers to get down to whatever was burning in the trailers and then either put water or use a chemical extinguisher on the area that was burning. It was a smoldering fire, it wasn't a flame that you could see.

Q. Was there more than one trailer involved? A. Yes, there was.

1506 Q. Several trailers involved? A. Yes, sir.

Q. The last time you saw the *Portmar*, which was March 4th, I think, her list had improved, that is she had straightened up to about ten degrees, is that right? A. Her list was not what it was on the day that we first left her.

Q. I would like to ask you a couple of questions about Wyndham. To reach the dock where you discharged gasoline at Wyndham you had to go up some kind of an estuary or river? A. Yes.

Q. How long was that, approximately? A. Well, I have no recollection of the exact mileage but there were no lights and very few marks of any kind at all, man-made marks. The man that took us had only been in there a few times himself so that we did not travel at nighttime. If there was any threat of rainsqualls obscuring the land he would not travel either and we had to anchor, so it took us quite some time, I cannot recall how long.

Q. Would you have any idea of approximate distance? I don't mean to hold you down to it but just your idea—was it five miles or ten miles? A. I might have some record in the logbook and be positive.

Q. Will you look in your log? A. I will take a look in the log. (Referring to log) No, there is no record in the logbook.

Q. Does the logbook show the time from the entrance—A. I am just looking for that. According to the logbook we weighed anchor at the place we were anchored inside Cross Island at 6.08 in the morning. 1508

Mr. Murphy: Is Cross Island off Wyndham at the head of the estuary?

The Witness: That is at the head of the gulf.

Mr. Murphy: At the mouth?

The Witness: Yes.

A. (Continuing) And we anchored the ship again at 6.45 because of a heavy rainsquall and we weighed anchor again at 9.28 and arrived off the dock at 11.46.

Q. 11.46? A. Yes.

Q. What was there at Wyndham that you could see, what kind of a port was it, if any? A. Wyndham was a 1509 meat-packing station with a big refrigeration plant and a small machine shop, small village, an airfield, and the dock adjacent to the meat-packing plant.

Q. So that you docked at the meat-packing plant's dock? A. Yes, that is all there was there to dock at.

Q. And was the airfield if you know an Australian airfield or a United States Army airfield? A. I don't know what it was.

Q. Do you know whether there were any United States Army soldiers there? A. We did not see any.

Q. And you did not see any Americans at Wyndham? A. No.

Q. Now, on the trip from Port Darwin for Koepang starting February 15th you spoke of some Australian cargo, tents and so forth? A. That's right.

Q. Did you have a manifest of the cargo on that trip? A. I don't recall having a manifest but when we first docked at Darwin to load this cargo they brought me as the chief mate of the vessel in charge of the stowing of it a list of everything that was to come in the ship and I was to arrange my stowage so that I would have room to quarter the soldiers in the tweendecks and carry all of the cargo.

Q. I don't suppose you have that list now? A. No.

Q. Will you tell us from your best recollection just what Australian cargo there was on the *Portmar* on that trip?

1511 A. As I remember it the Australian cargo consisted of rolls of barbed wire, iron barbed wire for making entanglements presumably, and bundles of iron sticks of some kind to be used with them and there was a sling load or two at the most, as I remember, of tents belonging to the Australians. Besides this motorboat, the *Nevbet*—I didn't know at the time that belonged to the Australians but later on when we were using that boat in the harbor after the *Portmar* had been stranded on the beach they told me it belonged to them and we had to get permission from them to use it.

Q. That sums up the Australian cargo, does it? A. That's all.

1512 Q. Were there any Australian personnel on board on that trip? A. No, sir.

Q. In answer to one of Mr. Murphy's questions you said that you did not say anything to anybody about the ship's back being broken. Did you think the ship's back was broken? A. No, sir, I did not think the ship's back was broken.

Q. Now, the holes in the skin of the ship which you saw were in holds 4 and 5. I am not sure whether you saw any holes in the skin of the ship opposite the engineroom or in the engineroom space? A. Yes, I did although I wasn't in the engineroom. As soon as we began to try to plug these holes I put two men on a raft over the side of the ship and while helping to get them started I was down on this raft with them. From there I could see the engineroom—they started up forward, the forward end of the ship—I could see the holes in the skin of the ship in the way of the engineroom.

Q. Were there many in the way of the engineroom? A. Well, I don't remember noticing particularly whether there were more or less there than anywhere else. I just remember this sieve, as it were, over that whole area.

Q. But not forward of the engineroom? A. From the outside of the ship you couldn't tell definitely whether they were in the engineroom or not but as I remember it extended just about to the middle of the ship what we could see.

Q. Did you have any oil in the deep tanks when the *Portmar* was bombed on February 19th? A. I don't recall offhand whether we did or not. That would not be my department, that would be the engineroom's department. 1514

Q. You spoke of the civilians at Port Darwin having been evacuated. You were there in Port Darwin from January 19th on to February 15th excepting for the trip to Wyndham—that is you arrived at Port Darwin first on January 19th? You can look at your log if you want to check that. A. Yes, we were at Port Darwin.

Q. My question is this: Do you know whether the civilians were evacuated prior to the bombing of February 19th? A. Do I know?

Q. Yes. In other words, did you see civilians in Port Darwin prior to the time you started for Koepang? A. Oh yes, I had my hair cut around the shopping district and 1515 started to go to a movie one night but it rained.

Q. So that the evacuation of the civilians at Port Darwin was because of this bombing that you went through? A. I don't know that but that is what I judged.

Q. That was the time of the evacuation, was it? A. I wouldn't know the exact time.

Q. There were civilians in Port Darwin prior to that? A. Yes, there were.

Q. You said that you had come to the opinion that salvage of the *Portmar* was hopeless. Will you tell us your process of reasoning, that is on what did you base that opinion, what were the factors that led you to that conclusion? A. Well, in the first place the situation at Darwin was such that everyone from one minute to the next expected

to be told that the Japs had landed on one of the beaches there. During the daytime there was no activity at all, all activity was at night, so to get anybody to go to work even to do anything you would have had to have them under military discipline. I know that I had seen what had happened when the port was attacked—the civilian stevedores that were there just disappeared you might say, they wouldn't go near the port, and we people who were acquainted with ships had been asked by our own Army to volunteer and we were the only people that would work. I
1517 remember when they started salvage operations on the *Portmar* there were some of the crews of these other Australian ships that had been bombed and sunk, they were there, and even they would not go near the *Portmar* to assist in the operations. The only people they could get to go down there were men in the armed forces who were told by their superior officers if they did not do it they were subject to whatever military rule the armed forces had on them. That was the first thing, and the next was there were no facilities in Darwin at all that did not belong to some military authority. What they did have there was such that very little could be done. There was one small railroad roundhouse there that took care of a narrow gauge
1518 railroad stop of the railroad that ran to Birdum and that's all. The *Portmar* previous to this had had some small repairs she wanted made to one of her auxiliary pumps and she could not get it done there, there was no facilities at all in Darwin for repairing this small pump, so I knew from that that there were no facilities in the way of machinery in Darwin. Between the danger from the enemy which naturally affected everybody's attitude and the lack of any facilities there I was of the wholehearted opinion that nothing could be done.

Q. There was nothing in the physical condition of the *Portmar* herself that prevented her salvage? A. Well, as far as I was able to see the *Portmar* was in such condition that it would have been, even if you did have the facilities in Port Darwin, say, that you had in Mare Island Navy

yard or some similar big repair yard with all they had, what little bit I know about it of the cost of shipyard repairs and cleaning of ships and such as that the cost would have been prohibitive. As to it being physically possible, yes, if you were able to have everything at your command you could have pushed the Japanese back to Yokohama perhaps, brought in everything you wanted, brought ships up the Torres Strait or up Fremantle, it would have been possible physically.

Q. Well, I take it that the situation with respect to the Japanese and the lack of facilities at Port Darwin are the two big factors that led you to your conclusion? A. Well, it led me to the conclusion practically, yes, as you said. Physically, if you had everything at your command, yes, it could have been done. 1520

Cross examination by Mr. Collins:

Q. Did you go with Captain Michelson on his visits to the American Consulates at any of these ports in Australia? A. I was with Captain Michelson when he first went to the American Consul in Melbourne.

Q. That was after? A. That was after we had arrived in South Australia.

Q. Well, I mean just after you arrived at Sydney and proceeded to the various other Australian ports, did you go with him to any of the consulates? A. No, I wouldn't do that. 1521

Q. You spoke of these cargo security officers who were non-commissioned officers in the American Army who were on board. Do you remember who they were? A. You mean their names?

Q. Yes. A. Offhand I cannot remember their names, no.

Q. How long did they remain with the ship? A. My recollection is they remained with the ship until she was brought to the dock in Darwin to discharge her cargo.

Q. They left after the cargo was discharged? A. No, sometime between the time she docked and the time we left Darwin for Wyndham they were removed from the vessel.

Q. Did you hear at any time while you were at Port Darwin after the bombing anything about the qualifications of Captain Williams as an expert on salvage? A. You mean at Darwin after the bombing?

Q. Yes. A. Yes, I think I heard talk of him being a salvage expert.

Q. About when was that? A. Well, that I don't remember.

Q. Did Colonel Petterson tell you anything about it? A. No, I don't believe he did.

1523 Q. Now, according to my notes you made two or three trips to and from the *Portmar* while you were in Port Darwin and Captain Williams was with you and Captain Michelson on some of those trips, is that correct? A. Yes.

Q. And on some of those trips the salvage of the Army cargo had already commenced? A. That is correct.

Q. You heard no conversation between Captain Michelson and Captain Williams at any of those times as to the possibility of salvaging the vessel as well as the cargo? A. No, I did not.

Q. In other words, at no time when you were present with Captain Michelson and Captain Williams was any mention made at all of the question of whether the ship
1524 herself could be salvaged? A. I don't recall any.

Q. How long did it take to go on this launch from the *Portmar* back to the dock at Port Darwin? A. Which launch is that?

Q. Well, I recall you went on two. How long did it take on the *Nevbet*? A. Well, I don't recall the exact time, we never timed it, but with the *Nevbet* it depended a good deal on the tide. She did not have very good power and if the tide were against you it might take two hours. If it were with you it might take an hour less.

Q. The other vessel you traveled on was what? A. On one occasion we went down on a small motor runabout or launch that I think belonged to some air line chap. They formerly had a base there. Another time we went down on a small freight craft, motor scow.

Q. I take it Colonel Petterson was in charge of the attempt to get out the equipment for his own regiment? A. The only occasion on which I saw Colonel Petterson there was the time he made the first trip down with Captain Williams and allowed me to go with him—that is the only time I know of him being there. The rest of the time I was there Captain Williams and one of his men were there supervising the actual unloading of the equipment from the *Portmar*.

Q. You spent two or more nights on the *Portmar* while Captain Williams was there engaged in that work? A. Yes. 1526

Q. And on none of those occasions did you discuss with him the question of salvaging the vessel? A. No, sir.

Q. You had heard at that time that he was something of a salvage expert? A. I don't recall just when it was I heard of his prowess as a salvage expert. It was sometime while we were in Australia.

Q. It was sometime while you were at Port Darwin, wasn't it? A. I am not positive but I think I heard something while we were there.

Q. Did you and Captain Michelson discuss between yourselves whether the ship could be salvaged? A. Well, as to the actual discussion as to whether it could be salvaged or not, whether we went into that I am not certain. I do know that we officers while we were living in that tent discussed a good many things. 1527

Q. Did you and Captain Michelson discuss whether she could be re-floated? A. Yes, I think we did that.

Q. What conclusion did you come to, if any? A. I don't know that we came to any conclusion. I do know that we were both—

Q. Weren't you—

Mr. Murphy: Have you finished?

Q. Excuse me, go ahead. A. Well, he asked me if we discussed——

Q. Go ahead. A. I do know that we were both aware of the lack of facilities in that port to float it.

Q. Wasn't it your opinion that it was no great feat to re-float the vessel? A. As I said to Mr. Mount, given the proper facilities which were not in Darwin it would have been a very simple matter as I saw it.

Q. Well, I refer you to the statement made in a letter from Captain Michelson to Mr. Warley, President of Calmar Steamship Corporation, Libellant's Exhibit 21 for identification, dated Melbourne April 17, 1942: "The ship was re-floated only for the reason that half the field guns and equipment of an American regiment of field artillery
1529 was in our 4 and 5 holds and the chief mate and chief engineer will when they arrive tell you that to re-float the ship was no great feat in itself". Does that refresh your recollection as to whether it was your opinion that the ship could be re-floated without great difficulty? A. I repeat the statement that I made just previous to this, that given the facilities which were not in Darwin and which we had no means of our own of obtaining—we could see no civil authority there that could obtain them for us—given these facilities, yes, it would have been a very easy matter.

Q. But actually neither you nor Captain Michelson made any attempt after the bombing to find those facilities? A. I don't know what Captain Michelson did in detail.

1530 Q. But you did not? A. I, no, it was not my business to, I was still taking orders from Captain Michelson.

Q. You spoke of the equipment aboard the ship being removed by the Australian Navy. Were you there when it was removed or when any of it was removed? A. I don't recall seeing any of the ship's equipment physically removed from the vessel. I do know that I saw a good deal of it on their lighters. I did see that a lot of it was removed from the vessel on subsequent visits. I knew what we had in the way of spare equipment.

Q. I mean you did not see it being removed? A. No, I did not see the physical act of the passing.

Q. You don't know whether they requisitioned it or what? A. No, I wouldn't know that.

Q. Did you see any looting of the ship? A. Well, on one of the occasions when we returned to the vessel, I don't

recall just which it was, it must have been one of the first ones, we returned to the vessel and as we came alongside there was a small dinghy belonging to one of the Australian vessels anchored nearby and this dinghy was piled high with our belongings, mostly new shoes and new clothing that had been rifled—I say rifled—from the barracks bags and duffel bags of the soldiers aboard the vessel. When we arrived they—these things were all piled up in duffel bags that belonged to the soldiers, and when we arrived they told us there was some food off the ship they were saving and we were not satisfied and we opened the bags up and 1532
that is what we found, these things belonging to the soldiers and possibly some of the crew in these bags and we made them return them to the vessel.

Q. Had you ever been in Port Darwin before this voyage? A. No, sir.

Q. When you were approaching this place where the vessel finally was beached you were groping your way along, I presume—that is, you were using lead? A. We were using a lead line and trying to judge distances from various peaks and landmarks that were above water.

Q. And your object was to put the vessel aground somewhere in that area? A. That's right. 1533

Q. You could not be sure just where she would take the ground? A. Well, we had no physical way of determining right to the yard where the ship was.

Q. Nor the exact depth as you moved along? A. We could get the depth of the water with the lead line.

Q. You did bring up approximately near the spot you were aiming for? A. In the vicinity, yes.

Q. How old are you, Captain? A. Thirty-one.

Q. Were you in other bombing raids subsequent to this? A. Subsequent?

Q. Yes. A. No.

Re-direct examination by Mr. Murphy:

Q. Captain, I omitted to ask you whether or not when you looked in the holds of the vessel before the last occasion

1534 when you left the vessel did you make any observation as to the condition of the holds and engineroom with respect to oil and mud and water? A. Yes, sir, you couldn't escape this oil. It was, as I say, coated very thickly on everything—below the high tide line just everything was covered with a thick scum where this fuel oil had escaped from the ship's tanks.

Q. Was there any mud in the engineroom? A. I couldn't see any because it was full of water and oil and oil on top of the water.

1535 Q. That was all below the water and the oil on top of the water? A. Yes.

Q. Were you able to get access to the shaft alley back of the engineroom? A. No, sir, that was all under water.

Mr. Murphy: I would like to call on Government counsel to particularize the statement he made as being the nature of the Government's answer to the libel in this case. According to my notes Mr. Collins stated at the opening of the depositions that a defense on the part of the Government and the individuals whom he represents will be on the ground that the Court has no jurisdiction of the subject

1536 matter of this suit because the *Portmar* was a public vessel. I will ask Mr. Collins to state on what date it is contended by him that the *Portmar* became a public vessel.

Mr. Collins: We reserve the right to contend that the vessel was a public vessel because of the cargo which she carried from the outset of the voyage.

Mr. Murphy: Then your contention that she was a public vessel is based on the nature of the cargo which she carried out of San Francisco?

Mr. Collins: I expect to file an answer in the near future and I prefer not to make any further statement.

Excerpts from the Testimony of Captain Axel Michelson.

1537

Libelant's Exhibit 51.

IN THE

UNITED STATES COURT OF CLAIMS.

CALMAR STEAMSHIP CORPORATION,
Plaintiff,
against
UNITED STATES OF AMERICA,
Defendant.

No. 48509

1538

New York, New York,
December 5, 1950.

TESTIMONY FOR PLAINTIFF.

AXEL MICHELSON, a witness produced by the plaintiff, 1539
having first been duly sworn by the Commissioner was examined, and, in answer to interrogatories, testified as follows:

Direct examination by Mr. Murphy:

37Q. What was her speed under good weather conditions on a fuel-oil consumption of 164 barrels per day of 24 hours? A. 10 knots.

Cross examination by Mr. Smith:

1267XQ. Captain, you sailed a good many ships during the war period, I am told; is that true? A. Yes, sir, I had several.

1540 *Excerpts from the Testimony of Captain Axel Michelson.*

1268XQ. Have you sailed under routing instructions a number of times during the war? A. Which?

1269XQ. Naval routing instructions. A. Yes, sir.

1270XQ. Have you sailed in convoy? A. Yes.

1271XQ. Have you attended convoy conferences during the war time? A. Yes, sir.

1272XQ. Now, were the instructions that you received in San Francisco for the original voyage very much different in kind or quality from your usual kind of routing instructions you got during the war period? A. No, sir.

1541 1273XQ. And you got them from the Navy, just as you got all routing instructions during the war period; is that correct? A. Yes, sir.

1274XQ. Now, just to skip about a little bit while we are on this point: did the conference that you attended prior to departure from Darwin bound for Timor differ in any great respect from convoy conferences you attended on other occasions? A. Well, only in this way: that it seemed that authority was divided in Darwin. There was the American naval authorities, and Captain Rooks the commanding officer; and I received my orders from Lieutenant Gollar, that was of the Australian Navy.

1542 1275XQ. But otherwise it was the same as other convoy conferences which you customarily attended before sailing in convoy throughout the war period? A. Well, it differed a little in this way: that most of the conferences I have been through there were mostly merchantmen and there would be a naval officer there that would give us our instructions; but, in Darwin, there was at least as many naval officers —I might say there was more than twice as many naval officers as merchantmen. We were just four merchant marine captains to that conference.

1276XQ. But the procedure of getting together all the masters that are to form the convoy and giving them oral instructions about what to do in case the convoy is attacked and the other matters you testified to was essentially

similar to what goes on in every convoy conference, wasn't it? A. Yes, sir.

* * * * * * *

1309XQ. Captain Michelson, I understand that you have kept a record of your own of the points through which you were directed to pass in the routing instructions given you by the U. S. Navy before leaving San Francisco. Would you agree to check that record and write me a letter setting forth the points through which you were routed, so that I may send the original of the letter to the Commissioner and a copy of the letter to Mr. Murphy; and that that letter may 1544 be deemed your answer to my question about your routing instructions? A. Yes, sir.

Mr. Murphy: Will you also agree, Mr. Smith, that, if there is anything I have doubts about, I can write him a letter and ask him a question, and that that question and his answer go in in place of redirect-examination?

Mr. Smith: That is agreeable.

(Discussion off the record followed.)

By Mr. Smith: 1545

1310XQ. Now, Captain, can you state again the date when you received a message from the Navy Department to put into the Fijis? A. That was the 11th of December, as near as I remember.

1311XQ. And at that time were you on the route that was assigned to you by the Navy? A. No, sir.

1312XQ. Had you departed from it? A. Yes, sir.

1313XQ. Will you state the circumstances causing you to have departed from that route prior to the receipt of the message from the Navy Department. A. When I heard over the radio—we heard over the radio for days afterwards what was happening; when I heard that I went down and took a look at my orders and I saw that that course was

to take me between the two islands which I was trying to remember—I believe Fanning and Christmas; and I knew then that there were cable landings on both of those islands, and I knew the distance between the two islands—I couldn't pass through night or day without being observed. So I said to myself this is where I am going to depart from my Navy orders, because those two cable stations, that would very likely be the two first points down there the Japanese would try to get hold of and catch me down there in a trap right away. So from there on I steered a course south,
1547 because I said to myself that sometime before very long the Navy will do something about the ships they have got here in the Southwest Pacific and they will send orders to us, whereas, if I go between the islands, the Japanese very likely will pick me up, and there will be no ship to give orders to. So I steered a course just about which would keep me to the east of all the islands.

1314XQ. Now, about what time did you alter your course to depart from the Navy routing? A. That was as soon after as I was certain that this was the real thing we were hearing over the radio and not a hoax; and I started to worry about the ship then.

1315XQ. Could you give us some idea of the time of day
1548 that was? A. I would say within an hour when we first heard about it.

1316XQ. When was that, that you first heard about it? A. That was shortly after breakfast, November 7th.

1317XQ. December 7th? A. December 7th; I beg your pardon.

1318XQ. Could you, on this chart, Defendant's Exhibit 1, give us—an approximation, always, from memory and the best of your judgment—your approximate position at the time you made that alteration? A. No, sir, I could not; but I believe I could give you that from some old datas I have got home I could give that to you.

1319XQ. Will you include in the letter you are going to write to me another paragraph which will state whatever

your record indicates was your approximate position at the time you departed from the routing? A. Yes, sir, I will; but, if I shouldn't find it, I can't do it—I would have to guess again.

1320XQ. Give us any information you can. A. This point I should have passed through——

Mr. Murphy, Mr. Smith: Witness is pointing to "1".

(Answer continued): I was roughly there when I heard about Pearl Harbor. (Witness indicates on chart, Defend- 1550
ant's Exhibit 1.)

1321XQ. Would you mark a circle at that point you mention and letter it "A". A. (Witness marks chart accordingly.) This is a small-scale chart.

1322XQ. We all understand it is very approximate. And could you give us some sort of general approximation of your position at the time you received the Navy message? A. All very rough—B. (Witness marks the chart with a B.)

1323XQ. And would you state approximately how far south of your original route point "B" was—just approximate again. I will give you dividers, if it will help. A. (Witness measures.) Well, that's 10 degrees; that's 600 1551
miles. So that would be about 600 miles right there.

1324XQ. Will you state about how far south of your route Suva in the Fijis is? A. I'd say well over three hundred miles.

1325XQ. Something over three hundred miles? A. Yes.

1326XQ. When you got to Suva, what sort of orders did you receive from the British commander; were they routing instructions? A. Yes, sir.

1327XQ. Were they very much different, in type or kind, from the routing instructions you had received from San Francisco? A. No.

1328XQ. Did the American commander say anything about changing the destination from the Philippines to Port Darwin which would indicate that he knew about that

change in destination plan to you? A. There was no talk what would happen to the ship after I got to Sydney; but those two Commanders Gray were pretty decent men, both of them—they were sailormen, and you could feel that. I said to this British Commander Gray, "This is an American officer"—meaning this other Commander Gray—"Do you mind if I talk to him private?" "By all means, Captain," he said. "Take Commander Gray with you and ask him any questions you want to." Because I had been unable to get in touch with the American Consul there,
1553 and I wanted to get, as near as possible, an American officer or official's authorization on the step I was taking to obey the British orders. And he told me, he says: "Captain, it's absolutely all right. It's all with my knowledge and consent that you take those orders, and I wish you would do your very best to follow them up."

1329XQ. Now, the orders that you received were the route to follow to go to Australia? A. Yes, sir.

1330XQ. They had nothing to do with staying in Australia once you got there,—merely the route you were to take; is that it? A. They weren't mentioning what would happen to me when I got to Australia at all.

1554 1331XQ. They said nothing about discharging the cargo in Australia? A. No, sir. They told me to go outside Sydney quite a little distance—mentioned latitude and longitude; and they told me I would be met by a unit of the Australian Navy there and carried into port.

1332XQ. Into Sydney? A. Yes, sir.

1333XQ. Now, Captain, about how far south of your original route was this point off Sydney to which you were routed? A. Oh, that was about a thousand miles.

1334XQ. About a thousand miles? A. Yes, sir.

1335XQ. Did you arrive at the point off Sydney to which you were routed by the British Commander Gray? A. Yes, sir.

1336XQ. And what was the date when you arrived at that point? A. That was one of the last days in December.

1337XQ. Now, at that time, did you have any information at all about what the war situation was, over the radio or otherwise, north of where you were? A. Only in a general way.

1338XQ. Well, what general information did you have at that time? A. That the war situation was very bad—that is, seen with American eyes.

1339XQ. Did you have any information as to the Japanese operations in the Arafura Sea or the Coral Sea or any of the seas north of you? A. Yes, sir; we heard over the radio. Of course, I was no judge of how good the information was that we got over the radio. Part of the time it might only have been rumors, and I didn't believe nearly all we heard. In a general way, we knew that the Japanese were very much masters of the ocean route to the Philippines and towards Australia. 1556

1340XQ. Now, did you meet an Australian naval vessel at the point indicated by Commander Gray? A. No, sir, we did not; and I had been given oral orders that we were to wait outside until we were met by an Australian unit, and I was told, "Don't go in, Captain; they will shoot you down on the spot."

1341XQ. Well, what did you do? A. Well, I waited overnight. They have a lot of grass fires in Australia and bush fires, and it was so smoky out there that it was very difficult to get exact observations, because we had no horizon to measure from, and I remember the Mate and I were constantly taking observations so as to be in the exact point. 1557

While we were lying there—we got in about noon to the point—while we were lying there in the afternoon waiting for this Australian ship to meet us, two big ships—British ships I took them to be—they showed no colors, any of them—they saw us; and both of them, as soon as they saw us, they piped to quarters, because they thought that I was a German ship. There had been several German raiders in that part of the world, and they had gotten away with lots of British ships; and those ships they kept a considerable

distance from me, but I could see they had all their men standing at quarters. One of them, after waiting a while, she pulled out to sea again. The other one, she hung around until about dusk—that is, at a considerable distance; and I noticed that she turned away from me, so I didn't have much of a target if I had guns that could hit her. She kept turning away from me until evening; that is, she stayed in the same position, but she would make a swing against the tide and straighten out and just have her stern guns pointed at us. When it got dark, or just before that, she made a
1559 dash for the land about three miles to the north of us. She made for the land and disappeared.

1342XQ. What happened after that? A. We laid there all night, waiting for this Australian ship that never came. I had been told not to move from there because the waters they were mined from there to Sydney. We laid there all night, and, when morning came, early morning, just about sunrise—it was not clear but fairly clear, and I got stellar observations—good ones; so I corrected my position, and we stood in about a mile or two, because we were that far from the assigned position.

I told the Mate to check my positions, and he got essen-
1560 tially the same thing, within half a minute or so; and he said, "Captain, if we are going to lay out here any length of time, somebody is going to come along and shoot us down." I said, "I realize that." He said, "I suppose the Australians don't know about the orders you have been getting in Suva."

By that time, we didn't trust anybody, no matter who they were. Well, I said it would hardly be a fake,—that they had taken over Suva and could just fool us to that extent,—that they could give us fake orders.

So we waited until it was well daylight, and I says to the Mate, "I am going to Sydney." He said, "Captain, are you going to run us through the mine field?" I said, "Mr. Mate, this is a mine field; there are just four positions the British mark out on the chart, and they say that

field is mined; but, for all what I know, there may be four mines in the corner of it. I am going to take a chance, because we are taking no more chance steaming up through that field than we are laying up here."

So, shortly after that, we checked our position once more, and I steamed for Sydney.

1343XQ. And did your get through all right? A. Well, we didn't get very far up along the coast before the whole Australian Navy came up to meet us, and they were all standing by with everything they had. I had great big letters on my side that said "U S A", bigger than your 1562
windows, that you could see for miles. But the British, of course, didn't believe anything either; it could easily have been camouflaged. A cruiser run up each side and a corvette ahead and astern of me, so I was completely ringed in. Then they sent two launches with an armed crew alongside of me, and I was pretty sarcastic about that time. I said to the lieutenant in the launch: "What are you scared of; why don't you come aboard?" He looked up and said, "I will"; and he came aboard.

He said, "Captain, who are you and where do you come from?" I said I am the captain of the ship and told him what my name was and I said, "This is an American ship"; 1563
and I gave him a short résumé of what happened to me.

I said, "We were here last night. We were told to come to so-and-so position and we would be met by one of your ships that would escort us into port; but there was none there." I told him we waited, but it was kind of hot—dangerous to lay up there. He said, "It is dangerous to walk through a mine field." And I said, "What about your commanding officer taking all those cruisers through the mine field?" He kind of smiled sourly at that. He didn't trust me yet. So I took him up and showed him my papers.

He said, "Captain, there has been a mistake on somebody's part. I believe you are all right." So he signaled back to his commanding officer, and I was told to follow a certain ship of the Australian Navy up to Sydney entrance, which I did.

1564 *Excerpts from the Testimony of Captain Axel Michelson.*

When we came up to Sydney entrance, there was a pilot boat laying there, and I was told to stop and take the pilot aboard. There was a pilot came aboard and took the ship into port, but the Australian cruiser stayed with us,—I believe it was a torpedo destroyer; she stayed with us until we anchored in Sydney Harbor.

1344XQ. Now, after you anchored, did you go ashore? A. Yes, sir.

1345XQ. Did you get in touch with any American authorities? A. Yes, sir.

1565 1346XQ. Up to that time, had anybody given you orders to discharge cargo at any point other than your place of destination? A. Never heard a word about the cargo.

1347XQ. And you were about a thousand miles south of your route? A. Roughly.

1348XQ. But you were still following, generally, the course you were routed, but about a thousand miles south of it? A. Well, that can't hardly be called roughly, because that's worse than roughly.

1349XQ. Now, when you got ashore in Australia, did you learn anything further about the war situation? A. I did.

1350XQ. You did? A. Yes, sir, I did.

1566 1351XQ. Did you learn anything about the war operations in the seas north of Australia? A. Yes, in a general way, I heard that the Japanese they were pretty well in control of the situation north of Australia.

1352XQ. Did you consider that it would be advisable for you to proceed to the Philippines at that time? A. Mr. Smith, I didn't worry about it, because I knew that would be decided by people that knew more about it and had more authority than I did.

1353XQ. Now, when you saw the American officials in Sydney, was anything said about your cargo? A. Not right away. I was taken into port. The doctor came aboard and looked us over. The Australians they inspected the ship from fore to aft. They asked for my manifest, and I gave them this here manifest that stated I had a certain number

of pieces of supplies and war material to go to Manila. And they asked me, they said: "Is that all the manifest you have got?" And I said yes. I didn't know at that time that the eldest of the staff-sergeants he had this here manifest. We were later on the dock—at the dock in Sydney—one of Dalgety's wharves; and we were allowed to go ashore—the Staff-Sergeant, also, of course. And I think the Staff-Sergeant he went and reported to some American officer in Sydney and probably showed him the manifests.

I went up and got Dalgety as an agent. That was the 1568
first time I had ever met or seen anything of the Dalgety's; and, of course, they didn't know anything about what was going to happen to me. They helped me get around town and take care of my custom formalities; and one of Dalgety's men went up with me when I went to the American Consul General.

1354XQ. Did the Consul General say anything to you about the disposition of your cargo? A. No, sir, he did not. As far as the Consul General goes, they just took me into his inside office and introduced me to him, and I said a couple of words, and he said a couple of words; and he told me, in a general way, his men—the vice-consuls 1569
—would take care of me. And that was the only time I saw the American Consul General.

1355XQ. And when was the first time any official of any kind spoke to you about your cargo? A. I believe that it was when I got aboard the ship in the afternoon that the Chief Mate he told me that there was an American vice-consul and an American military attache aboard ship, and he said, "Captain, they are looking around on the hatches. Will I bring them up here?" I says, "By all means, do." They came up to my quarters then. I invited them in and they sat down and spoke for a moment. You didn't like to say anything on either side, because everybody was afraid of everybody else. Then the eldest staff-sergeant he came up and asked for permission to come in, and he

reported to this here military attache, and he told him—I forget what his rank was,—lieutenant-colonel—or maybe only major. He says, "Major, I carry a complete manifest of the cargo aboard ship." And that was the first time I knew anything about there being a complete manifest of the cargo.

1356XQ. And what did the major say, if anything? A. I don't remember. It seems to me that he told the staff-sergeant that later on in the day there would an American officer come aboard ship and pick up the manifest and get in touch with the Mate and find out how the disposition of
1571 that cargo was in the ship's hold.

1357XQ. Did you have a loading plan? A. No.

1358XQ. Isn't it unusual not to have a loading plan? A. Yes, it is. I always carry a loading plan when I sail for Calmar.

1359XQ. Did you receive orders not to prepare one when you sailed from San Francisco? A. We had nothing to do with it, and the army loaded the ship. They were in such a hurry to send the things into the ship that the major came time and again and said, "Captain, this cargo is just being thrown into the ship." And the Mate remonstrated with him, and said he had never seen any cargo
1572 thrown in any ship that way. They told the Mate it was no business of his, but the Mate kept on making his observations of the loading, and he knew in a general way how the cargo was stowed from fore to aft.

1360XQ. He didn't make out a plan for his own information or help? A. No, he did not. There was no time or chance to do it. We were so busy getting stores and picking up supplies that the Mate had more than he could hardly handle.

1361XQ. Now, after the major was told that the staff-sergeant had a complete manifest and had indicated he would get in touch with the Mate about the position of the cargo and so on, did you have any further conversations or transactions with any American or any authorities of any

sort about the cargo? A. I was in touch with the Consul every day as long as I was in Sydney and, of course, I was in touch with my agents, and they told me the way it looked I was going to be sent to a port further north and my cargo would be taken out and restowed or partly taken out and——

1362XQ. Restowed? A. Restowed, yes.

1363XQ. Was that subsequently confirmed by any order or direction? A. Yes, sir, it was.

1364XQ. And when did you receive the first positive direction about your cargo? A. That was the first positive 1574
knowledge I had of what was going to happen to the cargo that I received after I got to Brisbane.

1365XQ. Now, did you receive further orders to go to Brisbane after you arrived at Sydney? A. Yes, sir.

1366XQ. From whom did you receive those orders? A. I received that from the Australian Naval Control.

1367XQ. Was that a routing order? A. That was a routing order, yes, sir.

1368XQ. Now, when you got to Brisbane, did you receive any further orders concerning your cargo? A. Yes, sir. When I got to Brisbane, I arrived late in the evening, and I anchored off the town until the next morning. The 1575
next morning, they docked me—put me alongside of a wharf, and there was several American officers on the wharf that came aboard and came up in my quarters. They told me that part of my cargo was to be taken out of the ship, and it was going to be checked and restowed or maybe exchanged for some of the cargo that was already on the wharf. All the wharves around there was loaded with cargo or American military supplies and equipment just like I had. It seemed to me it was thrown ashore in practically any order, because there was a lot of confusion there. They had the manifests of the cargo, or copies of it, and they went over the ship, and the holds were opened up——

1576 *Excerpts from the Testimony of Captain Axel Michelson.*

1369XQ. Did they direct that that be done? A. Yes, sir.

1370XQ. Now, was that the first order you had received concerning the handling of your ship that was not a routing order? A. Yes, sir.

1371XQ. That was the first non-routing order you got from any authority when they ordered that the holds be opened up in Brisbane? A. Yes.

1372XQ. What date was that? A. Just you had heard rumors a little about Sydney.

1373XQ. No; the order that was not a routing order.

1577 A. That was the first order I got.

1374XQ. Can you tell me approximately the date of that? A. It seems now when I think back we arrived on the 5th of January so this must have been the 6th.

1375XQ. The 6th of January? A. As near as I remember.

1376XQ. That is, 1942, the 6th of January, 1942? A. That's right.

1377XQ. Now, did you have any information at that time as to the state of the war up north, in addition to what you had when you first arrived in Sydney? A. Yes, sir; I knew it was not getting any better.

1578 1378XQ. Had the Japanese ever put in an appearance in those waters; do you know or had you heard? A. Well, of real, exact information there was none around. It was all rumors and hearsay and what you would hear on the radio and get an idea of from the headlines of the papers. How good it was, I didn't know.

1379XQ. But you knew the war wasn't going well in the waters north? A. I did.

1380XQ. I think you previously testified that your cargo was partly unloaded and sorted and restowed? A. Yes, sir.

1381XQ. Did you get any sort of receipt or document from the army authorities, acknowledging receipt of your cargo, or any document concerning your cargo, that you recall? A. I don't remember I did.

1382XQ. Now, I believe you testified previously that you received orders at Brisbane to proceed to Port Darwin? A. That's right.

1383XQ. And that you then proceeded to Port Darwin and were diverted from that route after one night? A. In order to get from Brisbane to Darwin, we went through what is called the "Barrier Reef"; that means running between the mainland of Australia and a little string of shoals and coral islands off the coast. And this here Barrier Reef reaches up all the way to Torres Strait; and it was in Torres Strait that I got signals from a signal station 1580
ashore to come into port for orders.

1384XQ. And you put into port, did you? A. I put into port for orders, yes.

1385XQ. And what orders did you receive there? A. There were no American authorities in the port; just the Australian Navy there. They told me that I was not to proceed any further until two Australian corvettes came up from the south to escort us to Darwin. When I say "us", I mean there were two ships laying there already, one being the American Army Transport *Meiggs* and one the Matson Line *Mauna Loa*. They were laying in the harbor already when I got there.

1386XQ. Would you characterize those orders as orders 1581
to join a convoy? A. Yes, sir.

1387XQ. You had seen many such orders in the course of sailing operations in war time, had you not? A. I had been told in Sydney that proceeding to Darwin I was to receive orders from the Australian naval authorities whenever I got in touch with them.

1388XQ. But, during your days at sea, during the last war, did you receive many orders about joining convoys? A. Yes, sir.

1389XQ. It was quite a common instruction to receive during the war time, wasn't it? A. Yes, sir.

1390XQ. And this was such an instruction, wasn't it? A. Yes, sir.

1582 *Excerpts from the Testimony of Captain Axel Michelson.*

1391XQ. I believe you previously testified that you did wait for the Australian corvettes and that they did appear; is that correct? A. Yes, sir.

1392XQ. And that then you proceeded in convoy to Port Darwin? A. Yes, sir.

1393XQ. Now, when you got to Port Darwin, did you receive any orders or instructions? A. When I got to Darwin, I reported to the Australian Naval Control, as I testified here yesterday; and Lieutenant Gollar of the Australian Navy he took me down and introduced me to
1583 this here Lieutenant-Colonel Jones that I believe I also mentioned here yesterday——

Mr. Smith: Yes.

(Answer continued):—This here Lieutenant-Colonel Jones he was, in sailor's language, executive officer for the commanding officer, who was Colonel Robinson. I remember he took me in and introduced me to Colonel Robinson.

1394XQ. And what instructions or orders were given you at that time? A. Colonel Robinson he told me that my cargo was very badly needed and he wished that they could have started to discharge it immediately, but, he says,
1584 "Lieutenant-Colonel Jones, he will take care of you, Captain, and it will be taken out of you as soon as possible."

1395XQ. That was the first instruction you had had about your cargo at Darwin, was it? A. Yes, sir.

(Discussion off the record followed.)

1396XQ. Now, did you receive any other instructions about the cargo while you were in Darwin; and, if so, what instructions? A. Well, what I said just about covered the whole thing. I understood they were going to take all the cargo out of the ship.

1397XQ. And you have previously testified that they did take it all out, except about 1500 barrels of high-octane gasoline, and then reloaded 300 of those barrels, so that.

you had a total of 2,000 aboard; and then you received instructions to take those 2,000 barrels to Wyndham? A. That's right.

1398XQ. And you protested that you didn't think it was wise and the order was confirmed and you proceeded to Wyndham to deliver the 2,000 barrels under the circumstances you previously testified to and returned to Darwin; is that correct? A. I didn't protest about my cargo being taken out, because by that time I had come to realize they knew more about the war than I did, and the American authorities—or American army—in Australia needed them desperately. 1586

1399XQ. I understand your protest was only about using the *Portmar* as a small boat to deliver 2,000 barrels, when smaller vessels were available. A. That's right; I protested strongly against that.

1400XQ. Now, then, were there any other instructions, not covered by that outline, which you received from any official source concerning your cargo while you were in Darwin or Wyndham? A. No, sir; not that I can remember or think of.

1401XQ. Now, does your logbook show your vessel's draft marks at various times? A. Yes, sir. 1587

1402XQ. Do you have a notation of your draft marks after you had returned to Darwin from Wyndham? A. Yes, sir, I believe so.

1403XQ. Would you let me know what those draft marks are. A. (Witness examines log.) In the morning after we had arrived from Wyndham, the draft was, at 8 o'clock, 10 feet and 7 inches forward and 14 feet and 3 inches aft, making a mean draft of 12 feet and 5 inches.

1404XQ. Now, do you have in your log a notation of your draft marks after you had taken aboard the 75's and the other materiel and the troops which you took aboard at Darwin after your return from Wyndham? A. When we left Darwin for Koepang, the draft was;—forward 11

1588 *Excerpts from the Testimony of Captain Axel Michelson.*

feet and 4 inches, and aft 15 feet and 2 inches, making a mean draft of 13 feet and 3 inches.

1405XQ. Now, for convenience, would you tell us what was the difference between the mean draft after your return light from Wyndham and the mean draft after you had loaded and were about to depart for Koepang? A. Ten inches difference.

1406XQ. About how much cargo would that indicate you were carrying, Captain? A. Well, as near as I remember, it was roughly 40 tons to an inch; ten times 40 would
1589 make 400.

1407XQ. Is that about the amount of cargo you had aboard? A. I couldn't say, because we did something to our water.

1408XQ. Did you take on any bunkers? A. No, we didn't take on any bunkers. But what was done to the water I am not quite certain of, but it seemed they took water off the *Portmar* along side of the wharf, because the drinking water they had in Darwin was none too good. But I am not certain whether it was done or not.

1409XQ. Now, were the instructions you received about proceeding to Koepang in addition to the instruction to go
1590 to Koepang what you would term routing instructions? A. Yes, sir.

1410XQ. And was the conference which you previously testified about,—aboard the *Houston*, was it? A. Yes, sir.

1411XQ. —A convoy conference? A. Yes, sir.

1412XQ. Have you attended many such convoy conferences in the course of the war? A. Yes, sir.

1413XQ. Now, would you indicate on the chart the approximate route which you were to follow from Darwin to Koepang, if you can, or is this too small a scale for you to follow? A. There is Darwin Harbor; there is Koepang——

1414XQ. Were you going direct route to Koepang? A. We steered a little to the south and west of Koepang on most of the course that we ran until we turned back.

In other words, the course we steered was to the left of what a direct course for Koepang would have been.

1415XQ. Now, how far about would you say that course would take you, at its nearest point, from a line between the points which you have marked "6" and "7" of your projected route, according to your routing instructions which you received in San Francisco? A. Two hundred to two hundred and fifty miles, roughly. I am hanging in the air, because I don't know if that mark I put down there is in the right place.

Mr. Smith: Just roughly is all you can possibly give us, Captain; we understand that. 1592

Commissioner Cowen: That's right.

1416XQ. Could you indicate with a circle and the letter "c" the approximate position of your convoy when the Japanese attacked?

Mr. Murphy: You mean on the second day, on the 16th?

Mr. Smith: That's right.

A. (Witness marks chart as requested.)

1593

Mr. Murphy: That is the main attack,—on the second day?

Mr. Smith: That's right.

Mr. Murphy: On the 16th?

Mr. Smith: That's right.

By Mr. Smith:

1417XQ. And I believe you have previously given us an estimate of the distance from that point to your point "6"; will you please re-estimate that distance from the point of attack to the point "6" on your projected route from San Francisco. A. 250 miles.

1418XQ. Thank you, Captain. Now, during the bombing attack,—that is, during the attack at sea at the point which you have indicated on the chart,—was your vessel subjected to cannon fire by attacking airplanes? A. No, sir.

1419XQ. Was any structural damage sustained by the hull of your ship, so far as you know? A. I believe that she was severely weakened.

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1433XQ. Now, when these bombs dropped alongside,—first to the port side and then to the starboard side,—did
1595 that have a twisting effect on your vessel at all? A. Well, I would simply say that it had a weakening effect. It would move the plates and the rivets against the ship's frames.

1434XQ. It would move the plates against each other and against the frame; is that right? A. Yes, sir.

1435XQ. And put a severe strain on the frame? A. On the rivets and on the frames.

1436XQ. Now, whereabouts did your bilge lines run, Captain? A. I don't know, sir, not for certain. I had a good chief engineer, and that was his job, to take care of that.

1437XQ. Well, did they run from the engineroom along
1596 the ship to the various bilges? A. In a general way, yes, sir.

1438XQ. Do you know what they were constructed of? A. I dare say that was specification pipe.

1439XQ. And now you say that those lines ruptured—some of those lines; is that right? A. Yes, they did.

1440XQ. Have you any idea how many of those lines ruptured? A. No, sir, I have not.

1441XQ. Were there more than one? A. Yes, sir.

1442XQ. Lines ran to both the No. 4 and 5 hold bilges; is that correct? A. Yes; as I understand it, yes.

1443XQ. What would that indicate as to the movement of the frame and the plating of your ship under the impact of these bombs? A. Well, I would say that there is very

little relation between the movements of the plates and the frames and the breaking of the bilge lines.

1444XQ. What do you think caused them to break? A. Undoubtedly, it was the severe strain put on them.

1445XQ. By the concussion of the bombs; is that right? A. Yes, sir.

1446XQ. Against your ship, not against the lines themselves? A. Against the ship, yes, sir.

1447XQ. Now, you say that, after the bombing attack, you noticed the vibration of your ship had changed; just how had it changed,—was it greater or less? A. It was much less. 1598

1448XQ. Did that indicate to you that the machinery had loosened itself on its bed; or just what did that indicate to you? A. Yes, it did.

1449XQ. That the machinery had shifted? A. It indicated that the structure of the ship had weakened, because one solid piece will work together; and, if it's loose, there will be far less vibrations than there are when it's hooked up hard together.

1450XQ. Do you think that the plating had loosened? A. That's what I thought they had.

1451XQ. The plating had loosened? A. The whole structure of the ship. 1599

1452XQ. Now, you mentioned the fact that the Chief Engineer had mentioned to you that the boilers had shifted in their saddle? A. I believe I said that the port boiler had moved in the saddle.

1453XQ. Again, I bring your mind back to this breaking of a piece of wire by bending it; can any movement of the boilers—severe jarring of the boilers—weaken the boilers, in your experience? A. It wouldn't do them any good.

1454XQ. It might make it dangerous if they were under heavy steam pressure; might it not, Captain? A. I would say so.

1600 *Excerpts from the Testimony of Captain Axel Michelson.*

1461XQ. Now, in the attack on the *Portmar* in Darwin Harbor, you testified that some bombs fell pretty close thereto; is that right? A. Yes.

1462XQ. Did they lift the ship out of the water at all? A. Yes, sir.

1463XQ. Did that strain the plating and the framing etc., in your opinion? A. In my opinion, yes, sir.

1464XQ. Did that weaken the plating and the framing, in your opinion? A. Yes, sir.

1465XQ. Was there any further rupture of the piping
1601 inside the vessel as the result of those bombs? A. I wouldn't like to say much about that, because that last afternoon we were there everything was so hectic that the Chief Mate told me lots of things that I don't remember today.

1466XQ. Now, you say that a great deal of paint and scale accumulated in the bilges; is that correct? A. Yes, sir.

1467XQ. Did that indicate that the paint and scale had been knocked off the plating and the trim by the terrific concussion? A. That's what it indicated.

1468XQ. That is the only way it could have been done? A. Yes, sir.

1469XQ. Now, when your cargo was on fire, were there
1602 any explosions in your hold? A. Small ones, yes.

1470XQ. Ammunition occasionally would go off inside your hold? A. Yes. I saw a man with a case of ammunition and I saw the cartridges exploding while he was handing it to a fellow on deck to throw overboard. I could see that from the bridge.

1471XQ. And could you feel the concussion of the explosion up on the bridge? A. Not from that.

1472XQ. Now, I think you described very graphically how the cannon fire damaged your ship, but could you give us a little bit more detailed information as to the size of the holes made in the hull by the aerial cannon? What were the largest ones in diameter,—to the best of your recollection? A. There were very few of those holes that were round; they were all jagged holes. They seemed rather to be tears than penetrations.

1473XQ. What would be the longest dimension of the largest hole, as best you remember? A. Seven or eight inches.

1474XQ. Seven or eight inches? A. Yes, sir.

1475XQ. And the holes would range down to holes having the longest dimension of how many inches; what would be the longest dimension of the smallest hole? A. There were a very few circular holes, just about the size of a dollar; but they were only a very few. Most of them they were jagged holes from the size of a dollar and up to what I was describing here.

1604

1476XQ. Now, you mentioned that ammonia fumes were escaping from your refrigerating system; was that from the concussion of the bombs or was that caused by the cannon fire. A. I believe that was caused by the machine-gun fire.

1477XQ. Where was the refrigerator located, Captain? A. On the shelter deck.

1478XQ. Did that get perforated by machine-gun and cannon fire? A. The main deck got perforated, I dare almost say, in hundreds of places.

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1484XQ. Now, when you ran aground, the vessel started 1605
to make water faster than you could get it out? A. She did.

1485XQ. And she started to list over on her side? A. Yes, sir. That was by that additional mishap that she hit on the starboard side; if she had hit on the port side, she would have been all right.

1486XQ. Did you consider that the *Portmar* was going to continue in operation as a ship after that? A. Mr. Smith, that afternoon I wasn't thinking of what profits the owners they would make with the *Portmar* in the future. I was just thinking of doing the best I could for the ship.

1487XQ. And for your men? A. And for my men.

1488XQ. There are always things you can salvage from a ship, even if it is grounded on a beach? A. Yes.

1489XQ. And you wanted to salvage what you could by getting up on the beach? A. By running ashore, we had a chance to salve as much as possible. Letting her sink up in the bay like the rest of them did, there would be nothing to do but swim for it.

1490XQ. You might be able to get the guns off her; you might be able to get valuable equipment off her; is that right? A. Right.

1491XQ. And the men would be saved? A. Yes, sir.

1492XQ. That was what was in your mind primarily, Captain? A. Yes, sir; mostly the men.

1607

1493XQ. Now, after you got off the *Portmar* on the beach and had an opportunity to examine her condition, in the light of what she had been through, did you think the *Portmar* worth repairing as a ship, Captain? A. She certainly would have been if it hadn't been for the war situation and the position she was in.

1494XQ. Captain, did you send some cables or telegrams to your owners about that? A. Yes, sir, I did.

1495XQ. What did you tell your owners about that? A. I told my owners I thought that the *Portmar* could not be repaired, because she was in such a position up there and conditions were such that nothing could be done to her at a

1608

cost which would make it possible for the owners or anyone else to care for repairing her.

1496XQ. Captain, sometime later, when you knew the *Portmar* was afloat and was being towed down, did you express an opinion to your owners as to whether the *Portmar* would be worth repairing, even if she was gotten to Sydney? A. Yes, I believe I did.

1497XQ. And what was that opinion, Captain? A. Well, I wouldn't dare to say exactly what was in the telegram. I was fixed like a good many others in those days; I had to change my mind quite often.

1498XQ. I show you a cable, which you sent from Melbourne; and ask you if that refreshes your recollection as to the opinion you expressed.

Mr. Murphy: May the record show what the number of the exhibit is that the witness is looking at?

A. Yes, sir, I sent them that telegram.

Mr. Smith: May the record show that the witness has refreshed his recollection by looking at Plaintiff's Exhibit 29.*

1499XQ. You state in this telegram that that is your considered opinion: "My own but unchanged well considered opinion that ship constructive total loss." Did that 1610
correctly state your view at that time? A. That was my opinion when I sent the telegram.

1500XQ. And was that your opinion when you last saw the *Portmar* on March 3rd, Captain? A. I wouldn't like to say what my opinion was on the 3rd of March, because I wasn't thinking of leaving Darwin then; I was thinking of staying with the *Portmar.*

1501XQ. I am not asking whether or not you wanted to leave the *Portmar;* I am asking you whether, when you were last on board the *Portmar,* you considered her to be a constructive total loss and not worth repairing as a ship. A. Yes, sir. 1611

1502XQ. You wanted to stay by the *Portmar* until you could get instruction from your owners and to save what you could out of her? A. That's right.

1503XQ. But you didn't think she was a going concern as a ship any more; is that right, Captain? A. I didn't think she was a very good ship, no.

1504XQ. She was a wreck, Captain, as far as you could judge? A. Yes; that is, not any wreck in this sense, that she couldn't be made into a ship again.

1505XQ. By spending more than she was worth on her? A. Yes, that's the way I figured it.

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* Libelant's Exhibit 20, Deposition Exhibit 25, in present cases; cable dated April 29, 1942.

1612 *Excerpts from the Testimony of Captain Axel Michelson.*

Re-direct examination by Mr. Murphy:

1513RDQ. Did you notify your owners of the points stated in the naval orders that were given you before you sailed in the *Portmar* from San Francisco; did you tell the owners that you had received those orders and what those various points were that you were ordered to pass through? A. I never mentioned to anyone before here yesterday, and I am sorry I did so yesterday.

1514RDQ. Will you answer the question: did you notify
1613 your owners at the time you got the orders before you sailed? A. No, sir, absolutely not.

1520RDQ. In case it isn't in the record yet, what kind of fuel did the *Portmar* burn? A. Fuel oil.

1521RDQ. Her engines were steam engines?— A. Steam engines.

1522RDQ. And the steam was generated by oil fuel? A. That's right.

1523RDQ. Now, the last time you saw the *Portmar* on the shoal, what was the first requisite, the first step, that would have to be taken, in your opinion, to begin the
1614 salvage of that vessel? A. The first steps would have been to get steam and to get pumps to take the water out of the ship after the holes had been temporarily patched up.

1524RDQ. Was there any power on the *Portmar* to drive the pumps—the pumps you have in mind? A. None whatever.

1525RDQ. And by "steam" you mean power for the pumps, whether steam or oil or any kind of engine; is that it? A. Any kind of good power.

1526RDQ. So far as you know, were any such gear,—pumps and power equipment,—available in Darwin at the last time you saw the *Portmar*? A. No, sir, I know there was not. I am almost absolutely certain.

1527RDQ. Did Captain Williams ever tell you where he got the pumps and the power machinery to work those pumps which he used in the salvage of the *Portmar?* A. Yes, sir, he did. He told me up in Sir Owen Dixon's office that he got them from South Australia.

1528RDQ. How did he get the pumps there? A. I wouldn't know. He had some kind of a salvage organization himself.

1529RDQ. Did he say whether he received any assistance in sending those pumps and engines across the continent to Port Darwin? A. Yes, he did. He said the Australian Government had made it possible for him to get the pumps to Darwin. 1616

* * * * * *

471Q. All right. Describe the events after the *Neptune* was destroyed. A. The next ship I saw them go after, after that, was the two American destroyers. They went over the *Perry* and they hit the *Perry,* and I saw the *Perry* blow up. She blew all to pieces—I could see her decks come up, and then she sunk. That was the last of her. I took a look at the *Preston,* and I saw that they had hit her also. She was afire in one place,—from the forward stack. I saw her ablaze from the forward stack in just one place. 1617 She was moving when last I saw her. Then they gradually come over the bay.——

472Q. Up to this time, had there been any direct attack on the *Portmar?* A. No, sir. Then they came back over the ships in the bay and started bombing one after another the ships out in the bay. They got the *Meiggs*——

473Q. The *Meiggs* is the United States transport? A. United States transport.

474Q. What did they do to the *Meiggs?* A. They bombed her, and I saw her sink. I saw them bomb the *Mauna Loa,* and I saw her sinking. She came up in the water with her stem, and went down stern first. That took a little time, though. After they got the two, they started to pay attention to us. They came down over us, but first

started machine-gunning. The sun was in the east, and they came up from the east and from the side of the town and over the ship time and again and machine-gunned us. They would just make a round turn, go off into the sun again, and come back and work over us again.——

475Q. Was there any anti-aircraft fire from shore against these Japanese aircraft? A. I believe I heard a couple of shots when they first went over Darwin. That died away in no time at all, and there was no resistance from the Port Darwin guns.

1619 • • • • • • •

538Q. Now, to return to the damage in your quarters, we have here some logs of the *Portmar* and it also appears that you turned in some secret codes to the Australian authorities, which we will come to presently; where were those papers on board the *Portmar*? A. Those papers they were in the wheelhouse.

539Q. In what? A. I had a canvas bag I had made myself for those papers and I had this bag weighted down with scrap iron the Chief engineer had given me, and we had orders to make certain, no matter what happened, those codes we had wouldn't fall in enemy hands. So all im-
1620 portant papers,—such things as my official log, the ship's logbook, her shipping articles, a few of the ship's documents,—I kept them in that canvas bag; and the Mate and myself knew where the canvas bag was and knew what to do with it if anything happened to me,—to put it over the side. And I remember very carefully telling him whenever he wrote out the log, to just go down and write it up and bring it back and put it in the canvas bag again.

540Q. So that was the way those books and documents got off the ship? A. Yes, sir.

541Q. What effect did the bombing have on the wireless shack and the wireless apparatus? A. The wireless shack was blown clean off the foundation; you could see clean underneath the house; and you could see the apparatus —the wireless—exposed.

1621

Deposition of Roy John Mark Merrett.

Respondent Underwriters' Exhibit 1.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
Libellant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Admiralty 133-332.

1622

Deposition of Roy J. M. Merrett, taken by Proctors for Respondents, pursuant to notice, held at the office of Mendes & Mount, Esqs., 27 William Street, New York, N. Y., on the 26th day of July, 1949, at 2:00 p. m.

Appearances:

1623

Messrs. KIRLIN, CAMPBELL, HICKOX & KEATING (EDWIN S. MURPHY and H. C. CUNNINGHAM), Proctors for Libellant.

Messrs. MENDES & MOUNT (RUSSELL T. MOUNT and WALTER B. HALL), Proctors for Respondents.

It is hereby stipulated that the testimony may be taken by a stenographer, signing, sealing, filing and certification being waived and stenographer's fees to be taxable.

It is further stipulated that Respondents will furnish to Libellant a copy of the within deposition.

1624 *Deposition of Roy J. M. Merrett—Direct.*

ROY JOHN MARK MERRETT, called as a witness by respondents, having been first duly sworn by Paul D. Hammer, a Notary Public, testified as follows:

Mr. Hall: This will be a deposition of Roy J. M. Merrett, a witness on behalf of respondents, taken by deposition *de bene esse* pursuant to notice served on proctors for libellant July 18, 1949, taken on July 26, 1949, starting at 2:35 p. m. at the office of Mendes & Mount, Room 1002, 27 William Street, New York City. The purpose of taking the testimony of Mr.
1625 Merrett, I would like to state at this time, is particularly related to the 45th, 46th and 47th articles of the answer of these respondents, which relates to the set-off based upon a fair and reasonable additional premium within the "held covered" clause of the policy, if the Court should hold that the "held covered" clause is applicable to keep the policy in force beyond February 13, 1942.

Direct examination by Mr. Hall:

Q. What is your profession or occupation, Mr. Merrett? A. I am an active marine underwriter at Lloyd's.

1626 Q. And how long have you been so employed or engaged? A. I commenced as a marine underwriter on January 1, 1935.

Q. During 1941 and 1942, were you engaged in underwriting hull war risks on vessels and cargoes? A. I was.

Q. For how many years prior to that had you been underwriting war risks? A. I think in 1937, 1938, at the time of the Spanish Civil War, war risks became an important factor and I was interested from then on.

Q. Are you still so engaged? A. Yes, sir.

Q. Let me ask at this time, do you know the underwriter for the Edinburgh Insurance Company, Ltd., in 1941? A. In 1941 the underwriter of the Edinburgh Company was Mr. Alexander Kennedy.

1627

Q. Is Mr. Kennedy available as a witness anywhere today, do you know? A. He died in about 1942, I think.

Q. Did you have anything to do with war risk hull insurance on the SS. "*Portmar*" for trading for one round voyage from United States Pacific port or ports, to a port or ports in the Philippine Islands, returning to the United States North Atlantic port or ports in or about the month of November, 1941? A. I did.

Q. So that you are interested in the outcome of the present litigation by the Calmar Steamship Company? A. Yes.

1628

Q. And you are one of the named respondents in this action; is that right? A. Yes, sir.

Q. Did you know, in 1941 and 1942, in general, what war risks other marine underwriters at Lloyd's and other British insurance companies were accepting and what premiums they charged for it? A. Yes.

Q. Did you personally accept or underwrite any war risk insurance in January and February, 1942, on merchant vessels engaged in transporting troops and artillery in any active war areas? A. No, sir.

Mr. Murphy: I object to that question as immaterial.

1629

By Mr. Hall:

Q. State whether or not you would have accepted or underwritten any war risk hull insurance in January and February, 1942, on merchant vessels engaged in transporting troops and artillery in active war areas if application had been made for such insurance?

Mr. Murphy: I object to that question on the ground that it is neither competent nor material as to what this witness would have done if a situation had been presented to him, and furthermore on the ground that it calls for a conclusion and is therefore objectionable.

A. No, sir.

Q. Did you accept any such risks in 1942? A. No, sir.

Mr. Murphy: Same objection.

Q. Assume that an American merchant vessel bound from United States ports to ports in the Philippines in December, 1941, had because of Japanese attacks in December, 1941, changed her course and had proceeded to the Fiji Islands, thence to Sydney, Australia, thence under military or naval instructions of either or both the United States and/or Australia, proceeded along the east coast of Australia
1631 and to Port Darwin and Wyndham on the north coast of Australia, would you or would you not have accepted or underwritten war risk hull insurance on such a voyage in waters north of Australia in January or February, 1942?

Mr. Murphy: I object to that on the ground that it is incompetent and immaterial for this witness to testify as to what he would have done under a given set of circumstances.

The Witness: No.

By Mr. Hall:

1632 Q. Assume an American merchant vessel bound from the United States to ports in the Philippines in December, 1941, had, because of the Japanese attacks in December, 1941, changed her course and proceeded to the Fiji Islands, thence to Sydney, Australia, and thence under military or naval instructions of either or both the United States and/or Australia proceeded along the east coast of Australia and to Port Darwin and Wyndham, did you at any time in 1941 or 1942 accept or underwrite any war risk hull insurance in the waters north of Australia?

Mr. Murphy: Same objection.

A. Not to the best of my knowledge.

Q. Assuming the voyage I have just referred to in the last question, that an American vessel was making or intending to make a voyage along the northern coast of Australia between Port Darwin and Wyndham and a voyage between northern Australia and the Island of Timor, carrying ammunitions and troops at a time when it was known to be an active war area, would you or would you not have accepted or underwritten war risk hull insurance on such a voyage?

Mr. Murphy: I object to that question on the ground that in so far as it relates to a proposed voyage to Wyndham it is not within the issues framed 1634
by the pleadings. As to the rest of the question, I object on the ~~same grounds as stated heretofore~~, that it is incompetent and immaterial for the witness to state what he would have done in a given set of circumstances.

The Witness: The answer is no. May I interrupt for one moment, Mr. Hall?

Mr. Hall: Yes, certainly.

The Witness: I want to refer to a question you asked me a few moments ago. You asked me if I was interested in the result of this action, and I said yes. I think you then followed it by a question which I am 1635
not quite sure I understood properly, if I was a party to the action.

Mr. Hall: I said, "* * * and you are a party to the action."

The Witness: Am I a party to the action?

Mr. Hall: The nominal party is Sydney Keith Scott.

The Witness: He is the name I nominated for the action and I myself do not appear in it in that way.

Mr. Mount: Not as a named party.

The Witness: Not as a named party. I want to make my position clear.

Mr. Hall: We want it to appear that you are an interested party here.

1636 *Deposition of Roy J. M. Merrett—Direct.*

The Witness: But I am not a named party, which I believe you did state in your question.

Mr. Mount: You are not a named party.

By Mr. Hall:

Q. Assuming that an American merchant vessel in January and February, 1942, was making or intended to make a voyage along the northern coast of Australia and between northern Australia and the Island of Timor, carrying ammunition and troops, at a time when it was known to
1637 be an active war area, are you able to state what a reasonable rate of premium for such a voyage would be for war risk hull insurance? A. Yes.

Mr. Murphy: Before that answer, I object to the question on the ground that no proper foundation has been laid for such testimony by this witness. Also, I wish to add to my objection, on the ground that in so far as it refers to a voyage along the northern coast of Australia, it does not appear to call for testimony within the issues of the case.

By Mr. Hall:

1638

Q. What would have been the amount of such premium? A. Fifty per cent.

Mr. Murphy: Same objection.

Q. Assume that an American merchant vessel in January and February, 1942, was making or intended to make a voyage between the northern coast of Australia and the Island of Timor, carrying ammunition and troops, at a time when that was known to be an active war area, are you able to state what would have been a fair rate of premium on such a voyage?

Mr. Murphy: Objection on the ground no proper foundation has been laid for that testimony.

A. My answer is 50 per cent.

1639

Q. Will you assume that the SS. *"Portmar"* was a registered United States siggle-screw, ocean cargo steamship of approximately 8,600 tons dead weight, built in 1919, classified 100 A-1 with Lloyd's register of shipping and owned by the libellant herein, Calmar Steamship Corporation; assume further that the SS. *"Portmar"* sailed from San Francisco on or about November 28, 1941, bound for Manila in the Philippine Islands; and that the Japanese government declared war on the United States on December 7, 1941, and thereupon invaded the Philippine Islands; that on December 11, 1941, the Steamship *"Portmar"* ceased following the voyage to Manila and proceeded to the Fiji Islands where she arrived December 20, 1941, thence to Sydney, Australia, where she arrived on or about December 30, 1941, thence to Port Darwin where she arrived on or about January 19, 1942, thence to Wyndham, Australia, where she arrived on or about February 8, 1942; assume further that after all the outbound cargo of the *"Portmar"* had been discharged at Wyndham, Australia, on or about February 10, 1942, the vessel returned to Port Darwin without any cargo, arriving there on February 12, 1942; that she went to berth there on or about February 13, 1942; assume further that the SS. *"Portmar"* was there loaded with stores, military equipment, ammunition, 75 caliber field guns and between 300 and 400 officers and men of the United States Field Artillery, all to be sent to Koepang on Timor Island; assume further that the commander of the United States Navy Cruiser *"Houston"* stated to the master of the *"Portmar"* that it would be a very dangerous mission; that Koepang harbor was going to be a hot place; that the Cruiser *"Houston"* would not even dare to escort the *"Portmar"* into the harbor; that the said cruiser would accompany the *"Portmar"* to the entrance and that the commander of the *"Houston"* then said, "Gentlemen, I am sorry to say I have got to get out. You have got to get in and do the best you can;" assume further that the master of the *"Portmar"*

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had heard that an Empire Airways flying boat had been destroyed by enemy action en route from Darwin to Koepang on January 29, 1942, and that it was common knowledge on February 14, 1942, at Port Darwin that the Port of Koepang had already been bombed by the Japanese; assume further that it is held by the Court that the insured voyage of the "*Portmar*" from Pacific United States port to the Philippines and return was not broken up, terminated and abandoned on or prior to February 13, 1942, but that the voyage I have described constituted merely a change of
1643 voyage within the wording of the policy; and assume further that the policy involved includes the clause "held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage provided prompt notice be given these insurers when such facts are known to the assured and/or their managers, and an additional premium paid if required", or words to that effect, will you state whether or not you accepted or underwrote any war risk hull insurance on such voyages in 1942?

Mr. Murphy: I want to be sure before I state an objection that I correctly understood the conclusion of your question. Am I right in saying that I under-
1644 stand you are asking this witness to testify whether he did as a matter of fact underwrite or write insurance on any such voyage in 1942? Is that the correct nature?

Mr. Hall: Yes.

Mr. Murphy: I wish to note an objection only to certain parts of the question which appear to paraphrase portions of the evidence not accurately and reserve the right to correct the question in the event that it does appear to be inaccurate. I have not the time now to read the whole record in the case in order to verify the exact wording.

Mr. Hall: I think since the witness is not going to be here on the trial you ought to state the nature

1645

of the details to which you take exception to the question at this time.

Mr. Murphy: Then I will have to take a moment. In one respect the witness is asked to assume as a fact that that Empire Airways flying boat had been destroyed by enemy action en route from Darwin to Koepang at some time prior to the date in question. There is no evidence in the case that such was the fact. That is all I have at the moment.

By Mr. Hall:

1646

Q. Include also as a fact the point made by Mr. Murphy that there is no evidence that the Empire Airways flying boat had in fact been destroyed. A. May I answer the question now, sir?

Q. I haven't come to the question yet. I have merely given you the assumptions I wanted you to make. State whether or not you accepted or wrote any war risk hull insurance on such voyages in 1941 and 1942?

Mr. Murphy: I object to the question on the ground that it is incompetent and immaterial as to whether the witness accepted or wrote any such hull insurance.

1647

A. To the best of my knowledge and belief, no.

Q. State whether war risk hull insurance on such a voyage was written at Lloyd's or elsewhere in the London market?

Mr. Murphy: I object to that question on the ground that it has not been shown that the witness knows whether or not such insurance was written.

The Witness: To the best of my knowledge and belief, no.

By Mr. Hall:

Q. Can you state what would be a fair and reasonable rate of premium for such insurance coverage?

1648 *Deposition of Roy J. M. Merrett—Cross.*

Mr. Murphy: I object to that question on the ground that no proper foundation has been laid for it.

A. Fifty per cent.

Q. Will you state the basis for your statement of 50 per cent as the reasonable premium for such coverage?

Mr. Murphy: Same objection, and also on the ground that it seeks an elaboration by the witness of an opinion for which no proper foundation has been laid.

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A. I feel that the additional premium of 50 per cent is founded upon the hazards of the risk in question, the likelihood of the vessel's survival on such a voyage, and in general practice I would regard 50 per cent as a maximum additional premium which one could reasonably ask any insured to pay.

Q. What experience had you had in and prior to 1942 in fixing rates of war risk premiums at Lloyd's? A. The experience arising from leading very many such insurances which were placed in Lloyd's market, in numbers probably running into many hundreds or thousands of cases.

Q. Did you yourself, acting for yourself and/or for

1650 others, fix or accept rates on what you would call thousands of risks, war risks, on hull insurance? A. Yes, sir.

Q. Did you know what other hull war risk insurance was being placed at Lloyd's during 1941 and 1942? A. As an active underwriter in the market, yes.

Q. Did you know what premiums had been charged there during those years for the several risks? A. Yes, sir.

Mr. Hall: Your witness.

Cross examination by Mr. Murphy:

Mr. Merrett, you are a member of one of the syndicates on the Lloyd's policies issued with respect to the "*Portmar*", are you not? A. I was the active underwriter for the syndicate which leads the insurance.

1651

Q. You used the expression "which leads the insurance" and you also used that expression in your direct testimony. Will you tell us a little more what you mean by that term? A. Certainly, sir. When a broker is effecting an insurance in the Lloyd's market, or, indeed, in the London market, it is necessary for them to agree to terms of the insurance and its conditions and the rates of premium, with the underwriters, and with that object in view the details of the insurance are set down on what we call the slip which is a piece of paper containing those details. The person who has the responsibility of putting down his subscription first on the slip is known as the leading underwriter on the insurance and it is he who makes the bargain with the broker which is struck in regard to the insurance in question.

1652

Q. And do I understand that the leading underwriter then visits the other underwriters at Lloyd's on the floor and submits the risk to them to see if they wish to take part of it? A. No, sir. The leading underwriter accepts such proportion of the risk as he himself desires to take for his syndicates and the broker takes it around to the underwriters.

Q. Then to understand your expression of being a leader on the risk, it means you are the first one on? A. Yes, sir.

1653

Mr. Murphy: At this time, unless you object, Mr. Hall, I would like to offer in evidence the policies involved in this case.

Mr. Hall: No objection.

Mr. Murphy: I have here the original policies. First of all, Lloyd's policy which appears to bear the number of this risk D41/11356, dated February 12, 1942. I will ask that that be marked Libelant's Exhibit 51.

(Policy No. D41/11356, dated February 12, 1942, received in evidence and deemed marked Libelant's Exhibit 51.)

By Mr. Murphy:

Q. Would you like to look at that? A. Certainly.

Mr. Murphy: At the same time, I offer a policy apparently numbered 568, also bearing the No. D41/11356, this being the policy of the Institute of London Underwriters.

(Policy numbered 568, also bearing No. D41/11356, being policy of the Institute of London Underwriters, received in evidence and deemed
1655 marked Libellant's Exhibit 52.)

Mr. Murphy: Finally, the original policy of the Excess Insurance Company, Ltd., bearing apparently their number, 42/1426; down at the foot, D41/11356, the latter apparently being the broker's number assigned by Messrs. Thos. Stephens & Sons, Ltd.

(Policy numbered 42/1426, being policy of the Excess Insurance Company, Ltd., also bearing No. D41/11356 received in evidence and deemed marked Libellant's Exhibit 53.)

1656 By Mr. Murphy:

Q. Mr. Merrett, you have that Lloyd's policy before you. Will you tell us which syndicate was the one you were a member of? Do you know the number? A. Yes, sir. You used the expression "member of". I have used in reply "active underwriter for".

Q. I see what you mean. Am I to understand that you managed the affairs of that syndicate? A. At that time, yes, sir.

Q. Which number is it? A. 422 and 420.

Q. Looking at the list of members under syndicate 422 and syndicate 420, as they are set forth on the back of this policy, I notice that your name is not listed. Are we to understand that you were nevertheless active or the active

manager of those two syndicates on this list? A. I was the active underwriter for those two syndicates on this risk.

Q. Are we to understand that in the event that the underwriters are liable on this risk to Calmar Steamship Corporation, that you yourself are personally liable for a portion? A. I am liable in this way, sir, that each year's insurance account is terminated or closed by reinsurance in a succeeding year, and in a succeeding year I became a member of the syndicate and therefore I have carried my share of the liability of the reinsurance.

Q. And does that apply to this risk on the *"Portmar"* involved in this case? A. Yes, sir. 1658

Q. You were asked as to whether or not, within your knowledge, any risk such as the risk set forth in the hypothetical question put by Mr. Hall on the *"Portmar"* was accepted or underwritten at Lloyd's. Are we to understand that you know all that goes on in Lloyd's at all times? A. I couldn't say that, sir.

Q. And it is a large institution, is it not? A. Yes, sir.

Q. And it is always possible that some risks may be taken and led by an active underwriter and apportioned among other syndicates that you may never hear of at all? A. That is possible, sir, but in the case of war risk insurance at this time, most improbable. 1659

Mr. Murphy: I have nothing further.

Re-direct examination by Mr. Hall:

Q. You will note that Lloyd's policy, Libellant's Exhibit 51, is dated 19 January 1942? A. That is so.

Q. Does that indicate when the risk attached under the policy? A. Oh, no. No, that is merely the date on which the policy itself was signed. I beg your pardon. That was the date on which the policy itself was prepared by the insurance brokers for signature.

Q. Please explain the procedure whereby the risk was assumed under the policy prior to its issuance? A. I have

already described the way in which the underwriters assume their liability on slips. As soon as the underwriter commits himself upon the slip, he is at risk—he is positively at risk. The actual signature of the policy is made from the slip later on, and in this case it was not until the 19th of January, 1942, that the brokers caught up with preparing a document for signature in respect of this insurance.

Re-cross examination by Mr. Murphy:

Q. What about that date at the top of the first front
1661 page, February 12, 1942? A. That is the date, Mr. Murphy, which the Lloyd's policy signing bureau attaches when they have actually completed their own act in signing the syndicates on to the policy.

Q. Is it your understanding that the policy is not complete until the signing bureau issues it or puts its stamp on it, as you have described? A. The policy itself is not complete but the insurance is effective nevertheless.

Q. And are we to understand, then, that the insurance on that policy took effect January 19, 1942? A. No, sir; the insurance took effect for the voyage which is described in it, which occurred, I think, in the month of November or
1662 December, 1941. May I point out something else here?

Q. Go ahead. A. It says on the policy: "Warranted sailing as per slip." I have no doubt that in the slip, to which I have already referred, a sailing date was set down, but for reasons of security that would not have been quoted in the document itself during the war, but the date on which I accepted the insurance is shown here as underwriter's reference, 26th of November, 1941.

Q. You are now referring to the column headed "Underwriter's Reference" on the back of the first sheet? A. Yes, sir.

Mr. Murphy: That is all.

Testimony of Albert William Theobald, Leslie Kingdon Sweet, Robert Hutchings Whittall, Noel Ryder Jenkins, George Christopher Bedwell and Harold Halton Mummery, Witnesses on Behalf of Respondent Underwriters, Taken by Commission to London. 1663

Respondent Underwriters' Exhibit 2.

First Interrogatory: State your full name, age, residence address, and your occupation or profession.

Answer of Albert William Theobald: My name is Albert William Theobald, I am 49 years of age, I reside at Woodrow Farm, Wigginton, Tring, Hertfordshire, England and 1664
I am a marine underwriter.

Answer of Leslie Kingdon Sweet: My name is Leslie Kingdon Sweet, I am 47 years of age, I reside at Sefton, Vincent Close, Esher, Surrey, England, and my profession is marine insurance.

Answer of Robert Hutchings Whittall: My name is Robert Hutchings Whittall, my age is 57 years, I reside at Flat 27, 7 Princes Gate, London, S. W. 7., England and I am a Deputy Underwriter.

Answer of Noel Ryder Jenkins: My name is Noel Ryder Jenkins, my age is 55 years, I reside at Mowbray, Bickley, Kent, England, and I am now retired.

1665

Answer of George Christopher Bedwell: My name is George Christopher Bedwell, my age is 54 years, I reside at 35 Bethune Avenue, London, N. 11., England, and I am an adjuster of claims.

Answer of Harold Halton Mummery: My name is Harold Halton Mummery, my age is 57 years, I reside at 73, North Gate, Regents Park, London, N. W. 8., England, and I am an underwriter.

Second Interrogatory: State what your profession was in February, 1942, and how long prior to that time you had been engaged in that profession, and what your experience had been therein.

1666 *Testimony of Witnesses on Behalf of Respondent Underwriters—Direct.*

Answers:

Theobald: In February 1942 I was a marine underwriter and I had been engaged in marine underwriting for the previous ten years. I had been in the underwriting room of the London Assurance, one of the largest British marine companies operating in the market, for over 20 years.

Sweet: In 1942 I was deputy underwriter. I started my career in marine insurance in 1920 and I was continuously engaged in it all the time. I have been deputy under-
1667 writer of the Phoenix Groups of Companies since 1st January, 1934, and during the war I did practically all the underwriting because the underwriter of my Company was a Director of the Government War Risks Insurance Office as from the outbreak of the war.

Whittall: In 1942 I was deputy underwriter to Arthur James Whittall, underwriter for Lloyds Syndicate. Prior to the war, I had been with the Union Insurance Society of Canton Limited from the 1st October 1910 until July 1939. During that period I was in charge of several of their important branches in India, Malaya and China and, as the Branch Manager, had to undertake insurance underwriting for the Society. On the 1st November, 1939, I joined the
1668 staff of A. J. Whittall's syndicate at Lloyds.

Jenkins: In 1942 I was a marine underwriter to the Royal Exchange & Assurance Corporation, joint marine underwriter at the Sun Insurance Office and the Planet Assurance Company and joint London marine underwriter for Elders Insurance Company. I commenced marine insurance in 1913 and about 1925 became deputy underwriter to the Sun Insurance Office and was there from 1925 to 1938. The appointments first mentioned took place on the 25th March, 1938.

Bedwell: I was an adjuster of claims to the Union Marine & General Insurance Company, who are the London Agents of the Northern Maritime Insurance Company Limited. I had occupied that position since April 1939 and

1669

for thirteen years previously I had been deputy adjuster of claims with the same companies.

Mummery: Underwriter and Manager, Marine Department of the London Insurance, underwriter to the British Law Insurance Company and underwriter of the Guildhall Insurance Company Limited. I was appointed underwriter in December 1937 and in the marine insurance business since 1908.

THIRD INTERROGATORY: If in response to the foregoing interrogatories you have stated that you were a marine insurance underwriter or otherwise engaged in the marine insurance business, state whether, and, if so, to what extent, you have underwritten war risks on vessels, cargoes or both, and fixed premium rates therefor, and on what minimum number of occasions you have done so.

1670

Answers:

Theobald: Throughout the whole of the war I was regularly engaged in fixing rates of war risks, certainly with a minimum of 50 or 60 per day, on both cargoes and vessels.

Sweet: I should say it runs into many hundreds and probably thousands of risks.

1671

Whittall: It is impossible to estimate the number of occasions but during the war, as is well known, the bombing was considerable and very often Mr. A. J. Whittall was unable to reach the City, on which occasions the entire underwriting was done by myself, and during those periods I must have written a considerable number of war risk insurances going into several hundreds.

Jenkins: I have written war risks on vessels, and cargoes, and fixed premiums on thousands of occasions.

Bedwell: No. As I am not an underwriter, I am unable to answer that question. I have never underwritten a war risk on vessels or had anything to do with underwriting.

Mummery: I have done a considerable volume of war risk insurance, both hull and cargo, and particularly on the

1672 *Testimony of Witnesses on Behalf of Respondent Underwriters—Direct.*

cargo side as a member of the War Rating Committee. There have been many thousands of occasions.

FOURTH INTERROGATORY: If in response to the foregoing interrogatories you have stated that you were a marine underwriter for any insurance company or for any syndicate in Lloyd's which insured against hull war risks, state the names of the company or the group or groups in Lloyd's for whom you acted as underwriter at any time in 1941 or 1942 and between what dates you so acted.

1673 Answers:

Theobald: I was engaged in underwriting for the London Assurance during 1941 and 1942.

Sweet: I acted as deputy underwriter for the Phoenix Assurance Company Limited, the Union Marine and General Insurance Company Limited, the London Guarantee and Accident Company Limited and for the London Agency of the Northern Maritime Insurance Company Limited. I acted as such during the years 1941 and 1942.

Whittall: I was underwriting during the full years 1941 and 1942. In 1942, following a reorganization of Groups, I was underwriting for Groups Nos. 448, 449 and 621.

1674 I mentioned those only to pinpoint the numbers of the Groups in 1942 following the reorganization, but it follows that I was deputy underwriter during the two years mentioned.

Jenkins: The Companies were those I have mentioned in the First Interrogatory. I was with them for the whole of the two years mentioned. Also, there were subsidiary companies of theirs. War risk lines on American risks were usually accepted in the name of the National Provincial Insurance Company. There was a period when your Ambassador was here and there was a great deal of nervousness as to whether the transfer of funds from here to America to meet losses might be interrupted and, to meet that danger, we, the Companies, created a trust fund in America of $10,000,000.00. That was all done in the names

1675

of Companies who were not doing business in America. The National Provincial Insurance Company was used for that purpose and that purpose only. Actually, it is the Sun Insurance Office and the Royal Exchange.

Bedwell: This does not apply.

Mummery: For the aforementioned companies named in answer to Interrogatory No. 1 and I acted for them during the whole of the years 1941 and 1942.

FIFTH INTERROGATORY: If you know who was underwriter on hull war risks for the Edinburgh Assurance Co., Ltd. in 1941, please state his full name and (if you know) whether he is still alive. 1676

Answers:

Theobald: The underwriter for the Edinburgh Assurance Company Limited was Mr. A. L. Kennedy and he is not still alive.

Sweet: His name was Mr. A. L. Kennedy and he is dead.

Whittall: I do not know.

Jenkins: His name was Mr. A. L. Kennedy. He is not alive, but he was the underwriter for war risks for the Edinburgh Assurance Company in 1941 and 1942.

Bedwell: I think it was Mr. A. L. Kennedy. I could not say that definitely because I cannot fix the time definitely enough. His death was reported shortly after that time. 1677

Mummery: An old personal friend, A. L. Kennedy and, to the best of my knowledge and belief, he died in 1942.

SIXTH INTERROGATORY: Did you have anything to do with war risk "Hull" insurance on the S/S "*Portmar*" "for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports" in or about the month of November, 1941, and, if yea, state what you did and what your connection was with that insurance and with any policy or policies evidencing that insurance.

1678 *Testimony of Witnesses on Behalf of Respondent Underwriters—Direct.*

Answers:

Theobald: Yes. I accepted a line of $20,000.00 on the hull of this vessel for the round voyage U. S. Pacific Philippine return to U. S. at a rate of 1½ per cent. This risk was accepted by me through the London Brokers, Messrs. Thomas Stephens & Sons, Limited.

Sweet: I wrote a line of $30,000.00 on the S/S *"Portmar"* for the voyage mentioned. I think it was the end of November 1941, but I am not sure of the exact date. That
1679 was against war risks only. The policy was subseqently issued on our behalf. I had no connection with the policy.

Whittall: Yes. I wrote a line of $30,000.00 for the three Syndicates concerned.

Jenkins: Yes. As an underwriter I accepted a part interest in the war risk insurance on the hull of the S/S *Portmar* for one round voyage to the Philippines and Pacific Coast and back.

Bedwell: No, I did not.

Mummery: I underwrote a line of $16,000.00 on the risk in the name of the British Law Insurance Company.

Seventh Interrogatory: Did you know in general what
1680 war risks other underwriters at Lloyd's and other British insurance companies were accepting in 1941 and 1942, and what premiums were charged on those insurances? If yes, state the facts.

Answers:

Theobald: I naturally saw regularly the risks written by other underwriters because they only, in general, accepted a proportion of the risk and I shared in these risks. The premiums are on the slip and sometimes I might not have thought the rate was sufficient, when I declined to participate. In other cases, where I considered the rate was the correct one for the risk involved, I accepted a line. The premiums naturally varied with the voyages involved and were also greatly governed by the news available to us at the time the risk was placed.

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Sweet: Yes. I saw several hundred risks, probably thousands, some of which I underwrote and others which I did not write, although they had been written by other underwriters. Naturally, there were quite a lot of risks I did not see. There were all sorts of rates charged. The rate depended entirely on the hazard involved, the area in which the vessel was trading, the nationality of the vessel and other factors affecting the risk at the time the risks were presented.

Whittall: One naturally had a good idea as one saw a vast number of slips which other underwriters had written lines on as well as ourselves. The details of the premiums and the risks concerned were always shown on the slip. It is difficult to remember at this date what sort of rates were being charged. They varied according to the voyages concerned.

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Jenkins: I cannot give you an unequivocal "Yes" because I did not know what they were all doing, but generally speaking, yes. In a market you see the risks going round and you get some idea of what other underwriters are doing. The rates and conditions varied so very greatly and they varied from day to day. I knew the rates at the time; but they were fluctuating from day to day.

1683

Bedwell: No.

Mummery: I have only knowledge of those that were submitted to me for consideration. Each one varied in accordance with the voyage and risk and the time at which it was placed. The premiums varied with the hazards.

EIGHTH INTERROGATORY: State whether you accepted or underwrote any war risk hull insurance in January and February, 1942, on merchant vessels engaged in transporting troops and artillery in any active war area. If yea, state the details of operations and the geographical area covered.

1684 Answers:

Theobald: To the best of my knowledge and belief, I did not insure such risks because they were undertaken by the Government.

Sweet: No.

Whittall: I should say emphatically no for the reason that no information of this nature would have been permitted to be divulged to us by the British Government and, therefore, the risk could not be offered to underwriters
1685 without such information.

Jenkins: No, I did not.

Bedwell: No, I did not.

Mummery: No.

NINTH INTERROGATORY: State whether you accepted or underwrote any war risk hull insurance at any time, on merchant vessels engaged in transporting troops and artillery in any active war area. If so, state the times and the details of operations and geographical areas relating to each such insurance.

Answers:

Theobald: I make the same reply as for Interrogatory
1686 No. 8.

Sweet: To the best of my knowledge, no.

Whittall: Again emphatically no for the foregoing reason.

Jenkins: No.

Bedwell: No, I did not.

Mummery: To the best of my knowledge and belief, no.

TENTH INTERROGATORY: State whether or not you would have accepted or underwritten any war risk hull insurance in January and February 1942, on merchant vessels engaged in transporting troops and artillery in an active war area, if application had been made to you for such insurance.

1687

Answers:

Theobald: I think it very unlikely I should have accepted such an insurance because, owing to secrecy, I should not have had made available to me sufficient information to fix a rate for such a risk.

Sweet: Probably not.

Whittall: I consider it impossible to say what might have happened in a hypothetical case of this nature, but I think it very unlikely unless the operation concerned was to a very inactive war area.

1688

Jenkins: I would not have done so.

Bedwell: No, as I am not an underwriter.

Mummery: No.

ELEVENTH INTERROGATORY: State, if you know, whether in January and February 1942, war risks hull insurance on merchant vessels engaged in transporting troops and artillery in an active war area was accepted or underwritten at Lloyd's or elsewhere in the London insurance market. If so, please state the facts as fully as you can, including the market rates charged for such insurance.

Answers:

Theobald: I should think not.

1689

Sweet: I have never heard of any such risk being offered or placed.

Whittall: I should say definitely not because no such information would have been divulged by the Government, being a war secret.

Jenkins: I would say No.

Bedwell: I do not know.

Mummery: To the best of my knowledge and belief, no. I do not think such business would be offered because of censorship.

TWELFTH INTERROGATORY: Assume that an American merchant vessel bound from the United States to ports in the Philippines, in December 1941, had, because of the Japanese

1690 attacks in December 1941, changed her course and had proceeded to the Fiji Island and thence to Sydney, Australia, and had then under military or naval instructions of either or both the United States and/or Australia proceeded along the east coast of Australia and to Port Darwin and Wyndham,

a—Would you or would you not have accepted or underwritten war risk hull insurance on such a voyage in January or February 1942?

1691 b—Did you accept or underwrite war risk hull insurance at that time for such a voyage or voyages?

c—If yes, what were the conditions of such insurance, and what was the rate of premium charged?

Answers:

Théobald: (a) I think it very unlikely I should have done so. (b) No. (c) This does not apply.

Sweet: (a) Yes.

(b) Not for such a voyage, to the best of my knowledge.

(c) This does not apply.

Whittall: (a) It is probable we might have accepted
1692 hull insurance to ports in Australasia.

(b) It is impossible to say with any certainty. At that time we might have accepted a risk, as stated above, to and between ports in Australia.

(c) At this date I cannot recall what the rates or conditions were.

Jenkins: (a) Yes, for a normal trading voyage.

(b) I have no specific recollection of so doing, but it is quite likely that such risks might have been accepted on behalf of my company.

(c) So far as we are concerned, it would only have been cargoes and it would have been marine and war risks insurance together. The rates varied from day to day.

Bedwell: (a) This does not apply because I am not an underwriter.

(b) This does not apply as I am not an underwriter.

(c) This does not apply as I am not an underwriter.

Mummery: (a) If I had knowledge of the facts related in this interrogatory at the time the risk was submitted, I would not have accepted a line.

(b) No.

(c) This does not apply. 1694

THIRTEENTH INTERROGATORY: Assume that an American merchant vessel in February, 1942, was making or intended to make a voyage between northern Australia and the Island of Timor, carrying ammunition and troops at a time when it was known to be an active war area,

a—Would you or would you not have accepted or underwritten war risk hull insurance on such a voyage?

b—Did you accept or underwriter war risk hull insurance on any such voyage?

c—If yes, what were the conditions of such insurance, 1695 and what were the rates of premium charged?

d—If you were required to fix a reasonable rate of premium for such a voyage in January or February 1942, what would that rate have been?

Answers:

Theobald: (a) Most definitely no.

(b) Definitely no.

(c) This does not apply.

(d) I cannot say.

Sweet: (a) No. I should have said such a risk was practically uninsurable.

1696 (b) No.

(c) This does not apply.

(d) I cannot say.

Whittall: (a) This, of course, is a purely hypothetical case as, for the reasons already stated above of secrecy, no such risk would be likely to be offered to us. But, if such had been offered, I would not say emphatically we might not have accepted a small line at a very high premium.

1697 (b) No.

(c) This does not apply.

(d) If the military authorities had disclosed to us the full hazards of the situation, the premium in a case like this, if we did accept a small line, would be the equivalent of what is termed an overdue rate, and to my mind it would have been in the neighbourhood of 63 per cent at the very minimum.

Jenkins: (a) No.

(b) No.

1698 (c) This does not apply.

(d) 100 per cent, because I would not have touched it in any case.

Bedwell: (a) This does not apply because I am not an underwriter.

(b) This does not apply because I am not an underwriter.

(c) This does not apply because I am not an underwriter.

(d) This does not apply because I am not an underwriter.

Mummery: (a) No.

1699

(b) No.

(c) This does not apply.

(d) I say that no-one could require me to fix a rate. I would say it would be an even chance, which would be 100 per cent, but that is not the reply I would like to give.

In answering the following interrogatories numbered Fourteenth to Twenty-first inclusive, will you please assume all the following statements lettered A to F, to be true:

1700

A. Assume that the SS. *"Portmar"* was a registered United States, single-screw, ocean cargo steamship of approximately 8,600 tons deadweight, built in 1919, classed 100 A-1 with Lloyd's Register of Shipping, and owned by Calmar Steamship Corporation.

B. Assume that the SS. *"Portmar"* sailed from San Francisco on or about November 28, 1941, bound for Manila in the Philippine Islands; that the Japanese Government declared war on the United States on December 7, 1941 and thereupon invaded the Philippine Islands; that on December 11, 1941, the SS. *"Portmar"* ceased following the voyage to Manila and proceeded to the Fiji Islands, thence to Sydney, Australia, thence to Port Darwin, and thence to Wyndham, Australia;

1701

C. Assume that after all the outbound cargo of the SS. *"Portmar"* had been discharged at Wyndham, Australia on or about February 10, 1942, the vessel returned to Port Darwin without any cargo, arriving there on or about February 12, 1942 and that she went to berth there on or about February 13, 1942;

D. Assume that the SS. *"Portmar"* was there loaded with stores, military equipment, ammunition, 75 calibre field guns, and between 300 and 400 officers and men of the

1702 United States Field Artillery, all to be sent to Koepang on Timor Island;

E. Assume that the Commander of the United States Navy Cruiser *"Houston"* stated to the Master of the S/S *"Portmar"* that it would be a hot place, that the Cruiser *"Houston"* would not even dare to escort the *"Portmar"* into the harbor, that the Cruiser would accompany the *"Portmar"* to the entrance and said "then, gentlemen, I
1703 am sorry to say I got to get out, you got to get in and do the best you can";

F. Assume that the Master of the *"Portmar"* had heard that an Empire Airways flying boat had been destroyed by enemy action enroute from Darwin to Koepang on January 29, 1942; and that it was common knowledge on February 14, 1942, at Port Darwin, that the port of Koepang had already been bombed by Japanese war planes.

FOURTEENTH INTERROGATORY: State whether or not you accepted or underwrote any war risk hull insurance on such
1704 a voyage as is described in the foregoing assumptions designated by the letters D to F, inclusive:

Answers:

Theobald: No.

Sweet: No.

Whittall: Naturally we underwrote a line on the S/S *"Portmar"* for her original voyage, as indicated, to the Philippine Islands. She was then diverted with her cargo to Australia where it was unloaded, where, to my mind, the venture ceased. As regards the latter part of the voyage when she was taken under military control, a risk of this nature had never been to my knowledge offered on the market and, with the full information given in this assumption to which I am replying, I consider my previous rate of 63 per cent on the low side.

Jenkins: I did not. It is not a commercial venture and we were insuring commercial ventures.

Bedwell: I am not an underwriter and would not accept it.

Mummery: No.

FIFTEENTH INTERROGATORY: State, if you know, whether war risk hull insurance on a voyage, such as is described in the assumptions designated D to F, inclusive, was written at Lloyd's or elsewhere in the London market.

Answers: 1706

Theobald: I have no knowledge of any such risk.

Sweet: Not to the best of my knowledge.

Whittall: Not to my knowledge.

Jenkins: No.

Bedwell: I do not know. I am not an underwriter.

Mummery: To the best of my knowledge and belief, no.

SIXTEENTH INTERROGATORY: Referring to the assumptions designated by the letters D to F, inclusive, answer by "yes" or "no" whether you are able to state with reasonable certainty what a reasonable rate of premium would be for war risk hull insurance on such a voyage on the S/S "*Portmar*" in February, 1942. 1707

Answers:

Theobald: I cannot say.

Sweet: No.

Whittall: Yes.

Jenkins: Yes.

Bedwell: I do not know.

Mummery: No, except that I cannot imagine it to be less than 100 per cent.

SEVENTEENTH INTERROGATORY: If your answer to the Sixteenth Interrogatory is "yes", please state the amount or rate of such fair and reasonable premium.

Answers:

Theobald: This does not apply.

Sweet: This does not apply.

Whittall: I think on the information in the assumption, the rate would be at least 70 per cent.

Jenkins: 100 per cent.

Bedwell: I have no idea. I am not an underwriter.

Mummery: I refer to my answer to interrogatory No. 16.

EIGHTEENTH INTERROGATORY: Please state the basis and reasons for your opinion of the fair and reasonable rate of premium stated in your answer to the seventeenth interrogatory.

1709 Answers:

Theobald: This does not apply.

Sweet: This does not apply.

Whittall: In view of the statement made by the Captain of the "*Houston*", the risk was a very considerable one. The chance of bombing seemed fairly certain, but the risk that had to be estimated was whether she would be sunk or merely damaged and, if so, the probable extent of the damage which would call, in my opinion, for a very high rate.

Jenkins: Having regard to the risk, I should want a premium which would bring the amount received to a total

1710 of 100 per cent.

Bedwell: This does not apply.

Mummery: In the light of what I am asked to assume in D to F, I feel the hazards were such that there was little chance of the S/S "*Portmar*" escaping damage or capture.

NINETEENTH INTERROGATORY: Assuming the truth of all the assumptions lettered A to F inclusive set forth immediately preceding the Fourteenth Interrogatory; and further assuming:

G. That on her departure from San Francisco on November 28, 1941, the SS. "*Portmar*" was insured under several hull policies aggregating $860,000, each numbered D41/11356 insuring her against war risks on a voyage:

1711

"At and from a United States Pacific Port, to port or ports in the Philippine Islands, whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order and for 24 hours after arrival."

H. That it should be held by the Court that the insured voyage described in the foregoing assumption G was not broken up, terminated and abandoned on or prior to February 13, 1942, and the said policies mentioned in Assumption G were not thereby terminated, but that the voyage described in Assumptions D to F inclusive, constituted merely a deviation or change of voyage and continued to be covered by said policies numbered D41/11356; and

1712

J. That said policies numbered D41/11356 each included the clause:

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these insurers when such facts are known to the assured and/or their managers and an additional premium paid if required."

1713

Please answer by "yes" or "no" whether you are able to state, with reasonable certainty, such fair and reasonable additional premium for a voyage or voyages in waters north of Australia between Port Darwin and Koepang, described in the foregoing assumptions D to F, inclusive.

Answers:

Theobald: No.
Sweet: Yes.
Whittall: Yes.
Jenkins: Yes.
Bedwell: I do not know.
Mummery: Yes.

1714 *Testimony of Witnesses on Behalf of Respondent Underwriters—Direct.*

TWENTIETH INTERROGATORY: If your answer to the Nineteenth Interrogatory is "yes", please state the amount or the rate of such fair and reasonable additional premium.

Answers:

Theobald: This does not apply.

Sweet: 75 per cent.

Whittall: My opinion of the additional premium due has already been given in a previous answer.

Jenkins: Sufficient to bring the total premium up to
1715 100 per cent.

Bedwell: This does not apply.

Mummery: The additional premium I would require for the risks already mentioned is the balance of premium which would give me 100 per cent.

TWENTY-FIRST INTERROGATORY: Please state the basis and reasons for your opinion as to the amount or the rate of such fair and reasonable additional premium.

Answers:

Theobald: This does not apply.

Sweet: My reason for such a rate is that the risk was practically uninsurable. It would be a gamble. It is not a
1716 rate which I should imagine any shipowner would accept, unless he had to insure it. The hazard was such that I should say there was a rather slender chance of her coming through and, therefore, you would have to have a very high rate.

Whittall: The basis is as I have given already.

Jenkins: Because I do not consider that the venture was an insurable risk.

Bedwell: This does not apply.

Mummery: Because of the hazards involved.

TWENTY-SECOND INTERROGATORY: Please state the nature and extent of your personal interest in the outcome of the present litigation.

Answers:

Theobald: I have none.

1717

Sweet: None.

Whittall: I have no personal interest in it whatsoever.

Jenkins: None.

Bedwell: I have no financial interest in the outcome of the litigation. There might be a personal one in that I would like the attitude I have adopted towards the question supported. We do not turn down claims lightly, and the reasons we give, we hope, are sound. I would personally like to think the Court would uphold that I have not been wrong in the attitude I have taken.

1718

Mummery. I personally could not care less, but my company, of course, is interested.

Cross-Interrogatories.

First Cross-Interrogatory: Were you aware in November 1941, and are you now aware, of all the risks undertaken by Underwriters at Lloyd's, Institute of London Underwriters or by the Excess Insurance Co. Limited?

Answers:

Theobald: No.

Sweet: No.

1719

Whittall: Certainly not.

Jenkins: No.

Bedwell: No, I was not.

Mummery: Definitely no.

Second Cross-Interrogatory: Do the Underwriters at Lloyd's fix the premium on a risk, or do such Underwriters accept their proportion of risk in accordance with the terms stated on a slip on which someone else has fixed the premium?

Answers:

Theobald: The Underwriters themselves fix the premium.

Sweet: When a broker has a risk to place, he goes to the Underwriters who are recognized leaders on the type-

of risk concerned and he then quotes his client a rate at which he thinks he can probably complete the risk. On receiving an order to place the business, he proceeds to show the risk to underwriters, both Lloyd's and companies, who either write or decline the risk, according to their estimation of the rate being paid. It is the Underwriters who fix the premium and they accept or decline the risk in accordance with their estimation of the rate paid. Sometimes two or three rates have to be paid to cover the risk.

1721 I have known cases. You might get cases where Underwriters will write a risk at 5 per cent but where the broker has had to pay as much as 20 per cent to complete the risk according to the hazards involved.

Whittall: If the "someone else" is meant to mean a non-underwriter, the answer is emphatically no. Underwriters, of course, fix all rates and nobody who is not an underwriter would be permitted to take any part in rating.

Jenkins: The rate is fixed by the underwriter. Other underwriters may accept a share of the risk at the same rate as is fixed by the leading underwriter, or they may decline that risk and demand a higher rate. I am trying

1722 to point out that I have known this not only from the underwriting side, but from the point of view of having been a broker too in the 1914/1918 war. There were occasions when, in getting a war risk covered, the risk was started at 5 per cent and then, in order to complete it, as much as 20 per cent was paid, with varying rates in between, 5 per cent, 8 per cent, 10 per cent, 15 per cent and 20 per cent, all on the same risk. One man might say: "I think that is worth 5 per cent" and another man would say: "Well, I would not write under 10 per cent." It becomes a question of bargaining and as to how much the broker can cover. If he starts with one underwriter at 5 per cent and he has $1,000,000.00 to do, he may only do $250,000.00 at 5 per cent and he may do another $250,000.00 at 8 per cent, and then 10 per cent on another $100,000.00, and so on. It depends on the risk he has to cover.

1723

Bedwell: I do not know.

Mummery: Each underwriter is entitled to fix his own rate on the risk.

THIRD CROSS-INTERROGATORY: Are you personally interested in the outcome of this suit?

Answers:

Theobald: No.

Sweet: No.

Whittall: No.

Jenkins: No.

1724

Bedwell: Yes, as I have already stated in answer to Interrogatory No. 22.

Mummery: I have no personal interest at all.

FOURTH CROSS-INTERROGATORY: If judgment is rendered in this suit against Sydney Keith Scott et al., will you be called upon to bear or pay a certain proportion of the amount recovered by Calmar Steamship Corporation in respect of the *Portmar* under the policies here involved and referred to in Sub-divisions G and J of the Nineteenth Interrogatory?

Answers:

Theobald: Personally, no, but my company will. 1725

Sweet: My company will but I shall not.

Whittall: I personally shall not, but the Syndicates for whom I underwrote the line will be called upon.

Jenkins: Personally, I should not be called upon to pay anything, but, on the other hand, my Companies would. That would probably be the National Provincial Insurance Company, which is the Sun Insurance Office and the Royal Exchange, the Companies which underwrote the risk. I take it this is a case where, as is usually done, it has been agreed by the parties that if a case goes to Court, one underwriter is put up as the defendant and all the other underwriters will follow his fortune. If that is so, then my Companies would follow the fortune of the case and

1726 *Testimony of Witnesses on Behalf of Respondent Underwriters—Cross.*

follow the result against Mr. Sydney Keith Scott. To me personally, it would not make any difference.

Bedwell: No.

Mummery: Presumably the British Law Insurance Company would.

Fifth Cross Interrogatory: If you are, or in November 1941 were, a Lloyd's underwriter, what was the number of the syndicate of which you were a member?

Answers:

1727 *Theobald:* I was not a Lloyd's underwriter.

Sweet: I was not.

Whittall: I was not a member in 1941.

Jenkins: I was not a Lloyd's underwriter and I am not now.

Bedwell: I am not an underwriter and never have been.

Mummery: I was not a Lloyd's underwriter in November 1941.

Sixth Cross Interrogatory: Are you an officer or employee of any of the following:

Edinburgh Assurance Co. Ltd.
1728 Northern Maritime Insurance Co. Ltd.
Fine Art & General Insurance Co. Ltd.
British Law and Insurance Co. Ltd.
Planet Assurance Co. Ltd.
Elders Insurance Co. Ltd.
National Provincial Insurance Co. Ltd.
Excess Insurance Company Limited

Answers:

Theobald: I am an officer of the Fine Art & General Insurance Company Limited.

Sweet: Yes, the Northern Maritime Insurance Company Limited in my capacity as deputy underwriter of London agents of the Northern Maritime Insurance Company Limited.

1729

Whittall: No.

Jenkins: Yes, the Planet Assurance Company Limited and Elders Insurance Company. I was not an employee in the employ of the National Provincial Insurance Company, but accepted the risks in their name in my capacity as underwriter of the Royal Exchange.

Bedwell: I am an officer of the Union Marine and General Insurance Company who are the London agents of the Northern Maritime Insurance Company.

Mummery: Yes, the British Law Insurance Company. It is the British Law Insurance Company rather than the British Law and Insurance Company Limited.

1730

SEVENTH CROSS INTERROGATORY: If your answer to the Sixth Cross Interrogatory is negative, were you a stockholder or in any way financially interested in any of these companies in November 1941 or at any date between that date and the present time?

Answers:

Theobald: I was not a stockholder in any of the companies mentioned.

Sweet: No.

Whittall: I hold a few shares in the Planet Assurance Company, but I cannot remember, without referring to my books, on what date I bought them. From memory, I should say I bought them after 1941.

1731

Jenkins: Yes. I have a small shareholding in the Planet Assurance Company Limited.

Bedwell: No.

Mummery: No.

EIGHTH CROSS INTERROGATORY: Are you now financially interested in any of the companies mentioned in the Sixth Cross Interrogatory?

Answers:

Theobald: I have no financial interest in any of the companies mentioned.

1732 *Testimony of Witnesses on Behalf of Respondent Underwriters—Cross.*

Sweet: I am not interested financially in the Company as I have no shareholding in it at all, but as an employee, I presume I am financially interested.

Whittall: Only as a shareholder in the Planet Assurance Company Limited.

Jenkins: Only through that shareholding in the Planet Assurance Company Limited, which is very small.

Bedwell: No.

Mummery: I have no financial interest other than being
1733 an officer of the British Law Insurance Company.

NINTH CROSS INTERROGATORY: Was a slip describing the risk on the *Portmar* as "U. S. Pacific—Philippines and return to U. S. Pacific and/or U. S. Atlantic and 15 days . . ." submitted to you in November or December 1941?

Answers:

Theobald: Yes.

Sweet: Yes.

Whittall: Yes.

Jenkins: Yes.

Bedwell: No.

Mummery: No. It was submitted to my deputy, Mr.
1734 C. W. Bazell, who underwrote a line in the name of the British Law Insurance Company.

TENTH CROSS INTERROGATORY: Please examine the paper annexed to these cross interrogatories as Schedule A,* and state whether that paper is a true copy of the "Slip" which was submitted to you with reference to the *Portmar* in November or December 1941.

Answers:

Theobald: Yes.

Sweet: I do not remember what was on the slip now, but it appears to contain the particulars of the risk I wrote. I think there must be a typographical error in the phrase

* Schedule A, the "Slip", dated November 26, 1941, is printed as part of Libelant's Exhibit 4, fols. ..... to .....

1735

"Institute or American clauses drs. pay tax". It seems to me that it should have been "urs" meaning "underwriters pay tax".

Whittall: Yes, to the best of my recollection.

Jenkins: I do not know whether it is a copy or not, but I am prepared to assume it is a copy.

Bedwell: This does not apply.

Mummary: The details of the slip that I have had the opportunity of examining are in accordance with the records in my own office.

1736

1737

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Vol. II

(Pages 580 to 822)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 262

CALMAR STEAMSHIP CORPORATION,
PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 303

CALMAR STEAMSHIP CORPORATION,
PETITIONER,

vs.

SYDNEY KEITH SCOTT, ONE OF THE LLOYDS UNDERWRITERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 262—PETITION FOR CERTIORARI FILED AUGUST 7, 1952
NO. 303—PETITION FOR CERTIORARI FILED AUGUST 28, 1952
CERTIORARI GRANTED OCTOBER 20, 1952

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16. Cable: Calmar to Michelson, dated March 27, 1942	147	605
17. Cable: Malleson, Stewart to Calmar, dated March 30, 1942	147	605

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† Omitted pursuant to Stipulation printed at page 785.

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18. Letter: J. C. Outler, W. S. A., U. S. M. C. to Mr. H. W. Warley of Calmar, dated April 3, 1942	148	606
19. Cable: Calmar to Malleson, Stewart, dated April 7, 1942	148	607
20. Consisting of twenty cables and one letter	150	607
21. Letter: William Radmer, General Counsel, W. S. A., to Calmar, dated October 24, 1942	150	622
22. Telegram: W. C. Peet, Jr., to Calmar, dated November 12, 1942, as to requisition of title to SS. *Portmar*	151	624
23. Certificate of requisition of title to possession of SS. *Portmar* by the United States War Shipping Administrator at Brisbane, Queensland, Australia, dated November 17, 1942, signed by H. A. Rettig for U. S. W. S. A.	151	625
24. Computation of charter hire of SS. *Portmar* from February 19, 1942 to November 17, 1942	153	*
25. List of expenses paid by Calmar Steamship Corporation	154	*
25A. Amended list of expenses paid by Calmar with allocation of items chargeable to hull underwriters, respondents in Ad. 133-332	168	626
26. Deposition of Axel Michelson, Master of SS. *Portmar*, taken at New York, N. Y. on July 31, 1945	170	267
27. Profile plan of SS. *Portmar*	170	*

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28.	Axel Michelson's Marine Note of Protest on January 22, 1942	170	†
29.	Chart of harbor of Port Darwin with marks made by Captain Michelson	170	*
30.	Receipt dated February 21, 1942, given to Captain Michelson for secret codes by Australian Naval Authorities	171	*
31.	Memorandum: Frank LaRue, Lt. Col., Inf., to Captain Michelson, dated February 26, 1942	171	628
32.	Axel Michelson's Marine Note of Protest before U. S. Vice Consul, dated March 23, 1942, at Melbourne, Australia	171	†
33.	Marine extended protest of Axel Michelson, Master, Joseph Bullock, Mate, John B. Cumber, Chief Engineer, Charles H. Mathews, Deck Engineer, and Eivind Steen, A.B., before United States Vice Consul at Melbourne, dated March 25, 1942	171	*
34.	Axel Michelson's Marine Note of Protest before Edward James Hamilton, Notary Public, dated March 27, 1942, at Melbourne, Australia	171	†
35.	Captain Michelson's Extended Protest before Edward James Hamilton, Notary Public, dated March 27, 1942, at Melbourne, Australia	171	*
36.	Deck log book of SS. *Portmar*, November 20, 1941, to January 20, 1942, inclusive	171	†

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37. Deck log book of SS. *Portmar*, January 21, 1942, to February 19, 1942, inclusive	172	†
38. Pages of Official Log of SS. *Portmar*, February 15, 1942, to February 19, 1942, inclusive	172	†
39. Letter: Axel Michelson to Captain Douglas Taylor, dated August 1, 1942.	172	629
40. Letter: R. Douglas Taylor to Captain Axel Michelson, dated August 4, 1942	172	631
41. Memorandum: Colonel T. J. Plant of July 27, 1942 with notation by Colonel Grimm	172	632
42. Letter: J. P. Williams to Captain Michelson, dated August 13, 1942	172	633
43. Letter: H. F. E. Whitlam, Crown Solicitor, Commonwealth of Australia to Malleson, Stewart & Co., dated August 19, 1942	173	634
44. Letter: Axel Michelson to Malleson, Stewart & Co., dated August 14, 1942	173	635
45. Letter: Axel Michelson to Malleson, Stewart & Co., dated August 15, 1942, with postscripts dated August 15, 1942 and August 17, 1942	173	636
46. Report of preliminary survey of the *Portmar* by Lieut. Commander Horne	173	641
47. Report of survey of the *Portmar* by R. Douglas Taylor and A. G. Horne at Brisbane, dated September 19, 1942	174	642

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48. Captain Michelson's account of disbursements with vouchers annexed	174	
49. Report of joint survey of the *Portmar* at Sydney, dated February 15, 1943	174	650
50. Deposition of Joseph E. Bullock, Chief Officer of SS. *Portmar* taken at New York, N. Y., on August 2, 1945	175	449
51. Extracts from testimony of Axel Michelson, Master of SS. *Portmar*, in the action in the United States Court of Claims between Calmar Steamship Corporation, plaintiff, against United States of America, defendant, No. 48509, taken at New York, N. Y., on December 5-7, 1950	176	513
52. List of positions to be followed under Naval Orders received by Axel Michelson, Master of SS. *Portmar*, at commencement of voyage	177	655
53. Chart showing proposed voyage according to Naval Orders, and actual route taken by SS. *Portmar*	179	
54. American Syndicate Schedule of War Risk rates, effective February 15, 1942	265	

UNITED STATES OF AMERICA EXHIBITS.

A Authenticated copy of Naval Routing Instructions issued to Master of SS. *Portmar*, dated November 25, 1941	180	657
B Authenticated copy of Naval Radio Dispatch to all merchant ships, dated December 7, 1941	180	661

* These Exhibits will be handed up to the Court in a Separate Volume.

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C	Authenticated copy of Naval Radio Dispatch to *Portmar* to proceed to Suva, dated December 11, 1941	180	661
D	Certified duplicate original of Casualty Report dated March 26, 1943, filed by *Portmar's* Master with United States Coast Guard	180	662
E	Certified copy of Casualty Report, dated July 6, 1942, filed by President of Calmar Steamship Corporation	181	666
F	Mr. C. B. Yule's estimate, dated October 26, 1950, of cost of repairs in the United States, to put the SS. *Portmar* back in class, made from his examination of libelant's Exhibit 47	215	

RESPONDENT UNDERWRITERS' EXHIBITS.

1.	Deposition of Roy J. M. Merrett taken *de bene esse* in New York, July 26, 1949	225	541
2.	Depositions of Albert William Theobald, Leslie Kingdon Sweet, Robert Hutchings Whittall, Noel R. Jenkins, George Christopher Bedwell, and Harold H. Mummery, Underwriters in the London Market, taken under Commission to London	226	555
3.	Letter from D. C. Anderson, Underwriter of American Marine Insurance Syndicates to the Policy Form Committee of the Syndicates, dated January 12, 1940, requesting approval of a redrafted Free of British Capture Hull Clause	231	671

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4. Certified copy of extract from minutes of meeting of the Board of Managers of American Marine Insurance Syndicates held January 18, 1940, accepting report of the Policy Form Committee and approving the form of the above clause	233	673
5. Circular letter of American Institute of Marine Underwriters to all members, dated July 18, 1940, enclosing American Institute Free of Capture Clause No. 3 (July, 1940), Form 87A-56	236	
6. Circular letter of American Institute of Marine Underwriters to all members dated September 24, 1940, enclosing American Institute war clauses foreign hulls (September 1940) Form 87A-68	238	680
7. American Institute (October, 1939) Free of British Capture cargo clause Form 87A-47	242	683
8. American Institute (July, 1940) Free of British Capture cargo clause Form 87A-56	243	683
9. Judgment of Starke, J., of the High Court of Australia in Melbourne, Australia, rendered November 19, 1943, in the salvage suits brought by United Salvage Proprietary, Ltd. and Williams against the ship *Portmar*, and by the Australian Salvage Board against Calmar Steamship Corporation	261	684

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